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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 82-

CENTURY AIR FREIGHT, INC.,
Petitioner,

against

CIVIL AERONAUTICS BOARD and AMERICAN AIRLINES, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Questions Presented

1. Was the Congressional policy for the protection of thes shipping public, expressed in the 1977 enactment of § 1002 (k) of the Aviation Act; 49 U.S.C. § 1482 (k), mandating common carrier status and obligations upon air cargo carriers for the era of deregulation, violated by substantive orders of the Civil Aeronautics Board ("CAB") approved by the judgment of the Court below, sanctioning and allowing a covered aircraft operator, by settlement agreement with the agency, to select or reject shipper customers as the carrier perceives comparative profitability to itself in making the selection?

2. Although neither the CAB's order herein nor the judgment of the Court below mention § 1002 (k) of the Aviation Act nor utter the phrase "common carrier", notwithstanding the statute was petitioner's principal ground for objection thereto, and the Court judgment explicitly holds, "Nor was there error in allowing American Airlines to refuse reasonable requests for service • • •", whether it is not compellingly important to measure the validity of the administrative suspension of the duty to carry on reasonable request against the new Congressional mandate repeatedly defining "air transportation of property" as meaning "the carriage by aircraft of property as a common carrier for compensation or hire • • •"?

3. In this antitrust case acquired from the district court by the agency's assertion of primary jurisdiction of the cause where the exclusionary space allocation practices claimed violative of the antitrust laws would, if so found, necessarily also be violative of the Aviation Act, whether the CAB could properly refuse to consider and rule upon the validity of the practices under antitrust while approving them as valid under the Aviation Act, and whether such a ruling of Aviation Act validity would not necessarily be improperly prejudicial to the antitrust claim?

• • • • • •

The caption of the case in this Court contains the names of all parties to the proceeding in the Court below.

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The Court of Appeals has decided important questions of Federal Law which have not been but should be settled by this Court.

1. The impact, meaning and application of the 1977 Congressional mandate of § 1002 (k) of the Aviation Act, 49 U.S.C. § 1482 (k), imposing common carrier status and obligations upon freight air carriers in the interest of protecting the shipping public in the era of deregulation ought to be settled here to evaluate the validity of a Civil Aeronautics Board settlement allowing a direct air carrier

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to select or reject shipper customers as the carrier perceives its own best economic interest, and to refuse reasonable requests for the service it holds itself out as offering to the public. Such adjudication is both necessary for the proper disposition of this case and would resolve fundamental questions of great public importance at the very threshold of air transport deregulation 22

2. It was error to allow the CAB, without hearing and refusing to rule on antitrust, to hold as valid under the Aviation Act the same practices complained of as violative of antitrust; practices prevailing when the adminstrative complaint had issued. The CAB has a duty to inquire the legality of its orders under any applicable law, and it cannot leave Century with the burden of convincing the district court that the same practices found valid under the Aviation Law are also violative of antitrust 31

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CIVIL AERONAUTICS BOARD and AMERICAN AIRLINES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above case.

Opinions Below

The Memorandum Judgment of the Court of Appeals will not be published. A notation of the Court's action has not yet been published in the Federal Reporter.

The Memorandum Order of the Civil Aeronautics Board herein dated July 29, 1981 bears No. 81-7-138, is available in slip sheet form, and has not yet been published in the CAB Reports.

The Memorandum Consent Order of Hon. John M. Vittone, Administrative Law Judge, dated April 17, 1981 bears No. 81-4-116, is available in slip sheet form, and has not yet been published in the CAB Reports.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed is dated as filed on April 21, 1982.

The jurisdiction of this Court is invoked pursuant to § 1006(f) of the Civil Aviation Act of 1958, as amended; 49 U.S.C. § 1486 (f), and 28 U.S.C. § 1254 (1).

Reason for Granting the Writ

The Court of Appeals has decided important questions of federal law which have not been but should be settled by this Court.

Statutes and Regulations Which the Case Involves

Aviation Act, § 1002 (k); 49 U.S.C. 1482 (k)

§ 1002 (k) Definitions

"(k) (1) For purposes of this section, the term 'interstate air transportation of property' means—

(A) the carriage by aircraft of property as a common carrier for compensation or hire in commerce between a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia (other than the carriage by aircraft of property by a common carrier between any pair of points both of which are within the State of Alaska or Hawaii if such carriage is part of the continuous carriage of such property and another common carrier provides, as part of such continuous carriage, the carriage by aircraft of such property between any pair of points one of which is within the State

of Alaska or Hawaii and the other of which is not with the same State); or between places in the same State of the United States (other than the State of Alaska or Hawaii) through the airspace over any place outside thereof; or between places in the same territory or possession of the United States, or the District of Columbia;

(B) the carriage by aircraft of property as a common carrier for compensation or hire, in commerce between a place in any State of the United States or the District of Columbia and any place in the Commonwealth of Puerto Rico or the Virgin Islands or between a place in the Commonwealth of Puerto Rico or the Virgin Islands or between a place in the Commonwealth of Puerto Rico and a place in the Virgin Islands;

whether such commerce moves wholly by aircraft or partly by other forms of transportation.

(2) For purposes of this section, the term 'overseas air transportation' means—

(A) the carriage by aircraft of persons as a common carrier for compensation or hire in commerce between a place in any State of the United States, or the District of Columbia, and any place in a territory or possession of the United States; or between a place in a territory or possession of the United States, and a place in any other territory or possession of the United States;

(B) the carriage by aircraft of property as a common carrier for compensation or hire in commerce between a place in any State of the United States, or the District of Columbia, and any place in a territory or possession of the United States, or the District of Columbia, and any place in a territory or possession of the United States (other than

the Commonwealth of Puerto Rico and the Virgin Islands); or between a place in a territory or possession of the United States (other than the Comwealth of Puerto Rico and the Virgin Islands), and a place in any other territory or possession of the United States (other than the Commonwealth of Puerto Rico and the Virgin Islands);

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(3) For purposes of this section, the term 'air transportation of property within the State of Alaska' means the carriage by aircraft of property (A) by a common carrier for compensation or hire in commerce between any pair of points both of which are in the State of Alaska if such carriage is part of the continuous carriage of such property and another common carrier provides, as part of such continuous carriage, the carriage by aircraft of such property between any pair of points one of which is within the State of Alaska and the other of which is not within such State, or (B) by a common carrier for compensation or hire in commerce between places in the State of Alaska through the airspace over any place outside thereof, whether such commerce moves wholly by aircraft or partly by other forms of transportation.

(4) For purposes of this section, the term 'air transportation of property within the State of Hawaii' means the carriage by aircraft of property (A) by a common carrier for compensation or hire in commerce between any pair of points both of which are within the State of Hawaii and the other of which is not within such State, or (B) by a common carrier for compensation or hire in commerce between places in the State of Hawaii through the

airspace over any place outside thereof, whether such commerce moves wholly by aircraft or party by aircraft and partly by other forms of transportation." As amended Pub.L. 95-163, §§ 10(b), 18(a)-(e)(1), Nov. 9, 1977, 91 Stat. 1282, 1286, 1287; Pub.L. 95-504, § 37(a), (b), Oct. 24, 1978, 92 Stat. 1741, 1742.

GENERAL RULES FOR ALL-CARGO CARRIERS, ER-1080, November 9, 1978

43 Federal Register 53628, 53631 (November 16, 1978)

DUTY TO CARRY

The Board is also exempting carriers in domestic cargo transportation from the duty under section 404(a) of the Act to carry on reasonable request, for the reasons stated in EDR-359 (pp. 14-15). Many respondents opposed this exemption, claiming that the carriers would take advantage of their freedom from a legal duty to carry by refusing to transport out-sized, perishable, and other kinds of cargo, such as live animals.

This exemption, however, does not relieve the carriers of their service obligations as common carriers, and does not apply to a carrier's duty to refrain from providing preferential treatment to particular companies or persons. Carriers holding certificates under section 401 or 418 of the Act remain, by definition, common carriers. The statutory duty to provide service upon reasonable request is broader than the service obligations of a common carrier at common law. At common law, a carrier is permitted to hold itself out as a carrier of only a particular kind of freight, and is not obligated to carry other types of cargo. This exemption, therefore, only ends the

Board's role in regulating the extent of the carriers' service offerings, * * *

GENERAL RULES FOR ALL-CARGO CARRIERS, ER-1080, November 9, 1978

43 Federal Register 53628, 53637 (November 16, 1978)

Subpart D—Exemptions for Domestic Cargo Transportation

§ 291.30 General.

The following exemptions, except as otherwise specifically noted, apply only to domestic cargo transportation. They do not relieve a carrier from obligations derived from other transportation.

§ 291.31 Exemption from the Act.

Each direct air carrier providing domestic cargo transportation is, with respect to such transportation, exempted from the following sections or subsections of the Act:

* * * *

(b) Subsection 404(a), except for air transportation of property within the States of Alaska or Hawaii, and (for all domestic cargo transportation) except the requirement to provide safe and adequate service, equipment, and facilities in connection with that transportation.

The foregoing exemption is published in the Code of Federal Regulations at 14 C.F.R. 291.31 (a) (2).

Additionally, the texts of the following pertinent statutes are set forth in Appendix 4 to this petition:

Aviation Act sections 102 (a)(7), 404 (a) and (b), 411, 412 and 414.

Sherman Antitrust Act, sections 1 and 2.

Administrative Practices Act, 5 U.S.C. sec. 706, Scope of Review.

Statement of the Case

This case centers on the domination of the New York City to San Juan, Puerto Rico air freight trade by American's containerized all-cargo flight, No. 841, flying on a daily schedule weekdays from New York to San Juan during the late night-early morning hours. That schedule, in a large capacity 707 aircraft, enabled air freight forwarders having access to that facility to pick up cargo throughout the metropolitan New York area during the day, consolidate it into containers to be flown to San Juan that night in ample time for breakout from consolidation in San Juan and delivery to consignees throughout Puerto Rico the following day, thus affording to those forwarders on board the ability to provide their shipper customers a "next day" service. Started by American in February, March 1971 as an incident of its takeover of Trans Caribbean Airways, Inc., the service afforded by Flight 841 was unique and nothing on that route offering a comparable service existed.

Century, on receiving its operating authorization from the CAB as an air freight forwarder in June, 1971, immediately requested container space aboard Flight 841, but notwithstanding more than 100 such requests of record for container space before May 5, 1977 when it started its district court antitrust action against American, it is undisputed that not a single container of Century's goods had been carried on Flight 841. Not until September 1977, four months after the start of suit, did American give Century a one-container standing allocation aboard Flight 841. Until then the embargo was complete.

The District Court Complaint*

An air freight forwarder, an "air carrier" licensed by the CAB, is a consolidator of the cargo of its customers

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*The Joint Appendix in the Court of Appeals, constituting the record herein ,will be certified to this Court pursuant to its Rule 19 (1) and (2).

to whom it issues its own airway bill of lading. Forwarders are both the consignors and consignees (at their destination depots) of the consolidated cargo given to the aircraft operator, the "direct' 'carrier. The direct carrier who gets paid by the forwarder is thus relieved of the diffuse collecting, receiving and bookkeeping functions and of the overhead expense entailed in such operations. Hence American allocated all 12 of its main deck container positions to air freight forwarders.

A salient feature of the trade to and from Puerto Rico is that Puerto Rico consistently imports more goods than it exports, with the result that in-bound freight accommodations are generally tight while outbound accommodations are generally comfortably adequate. At the same time most customers demanded a next day service for their goods and it was a competitive necessity for success as an air freight forwarder to be able to furnish such a service.

The embargo made it impossible for Century to function as a mainstream forwarder furnishing a comprehensive New York-San Juan service. That it survived at all was because of the relative ease in obtaining northbound carriage from San Juan to New York. Here not only did Century find accommodation with other airlines, it very early obtained standing allocations for two container positions aboard American's Flight 840, the northbound turnaround flight of the Flight 841 aircraft, going from San Juan to New York. The end result was a distortion in Century's growth so that it developed three times more northbound custom than it had southbound, and could not accept more southbound carriage because it could not get the lift for it.

In all of this time American never gave less than an allocation for 8 out of Flight 841's 12 main deck container positions to Profit By Air, Inc., a forwarder in competition with Century. And for that symbiosis between American and Profit By Air, the complaint relates a background.

Century is family enterprise whose principals are James Cirami and Salvatore Cirami, son and father. In the 1960's, conducting business in corporate form, they had been prominent in local trucking service to and from the airports in New York and in Puerto Rico; in fact, at the time of American's acquisition of Trans Caribbean Airways, Inc., the move which brought American into the Puerto Rico market, Cirami trucking enterprises were the contracted local haulers for Trans Caribbean both in New York and in Puerto Rico. American made plain its hostility to continuing the Cirami trucking concerns as its contracted local haulers; soon the trucking concerns ceased to be operative and thereafter they continued to exist only as litigating adversaries to American. The Ciramis, without a livelihood as truckers, became air freight forwarders.

Profit By Air, whose principal is one Harvey Pittluck started in business in 1969 and used Cirami both as its local trucker in New York and in San Juan, and, invaluably to its interest, as its entry to customers. Aware that the entry of the Ciramis, with their intimate customer contacts developed over years of trucking service would be formidably competitive should they ever secure a forwarder's license, Pittluck, through an adroit ethnic slur that the Century application represented a Mafia-racketeering entry into the air freight forwarding industry, succeeded in having the CAB delay forwarder's licensure to Century from February 1970 to June 1971—which was time enough for American, starting up with Flight 841 in February, March 1971, to fill the Flight with container allocations, awarding the lion's share to Profit By Air. And thereafter, notwithstanding the requirement of § 404 (a) of the Act that it was American's duty to furnish transportation on reasonable request therefor, American refused to carry as much as a single container of Century's goods aboard Flight 841.

The complaint seeks treble damages and a Clayton Act injunction.

Primary Jurisdiction

In the district court, prior to answer, American moved to dismiss the action on the ground that exclusive primary jurisdiction of the cause lay in the CAB. Declining to be a complainant to the CAB, but agreeing that the presence in the complaint of a prayer for injunctive relief entitled the CAB to an opportunity to decide what, if any, action the CAB desired to take with respect to the case, Century stipulated in open Court to give the CAB that opportunity. On October 21, 1977, Court and counsel received a letter from the Board's Enforcement Counsel saying in pertinent part:

> "In an attempt to set a course of action by common accord, the undersigned Enforcement Attorney has been in contact with counsel for both parties in the past week. In several telephone conversations, I have apprised them of the Board's view of the applicable law and of its general concern with this matter. They have both agreed that the public interest warrants that the Board conduct an investigation of its own through the Bureau of Enforcement, and I have informed them that it is the Board's intention to commence such an investigation as soon as time permits. I have advised both counsel that, with their permission, I would suggest to the presiding District Judge that he stay the present proceeding pending the outcome of this investigation. This would avoid duplication of effort and the possibility of the court and the Board reaching conflicting results. At the same time, a stay, as opposed to a dismissal, would prevent Plaintiff's monetary claim from being unfairly extinguished by the statute of limitations.
>
> "I have also advised both counsel that at the conclusion of the Board's investigation, this matter, which will now be treated as a formal complaint, will either be dismissed or made the subject of an enforcement

proceeding, depending upon the results of that investigation. Both counsel understood the risk and the benefit that each of these results presents to their clients. They have also been informed and recognize that should circumstances warrant it, the Board is empowered to enforce the Act and the antitrust laws either in an administrative proceedings or in an action brought in federal court, and that in the latter event, the doctrine of primary jurisdiction would not require any further referral to the Board in its adjudicative capacity, as was held in *Civil Aeronautics Board* v. *Aeromatic Travel Corp.*, 489 F.2d 251 (2 Cir. 1974)"

Accordingly the district court action was stayed.

Just about a month before, in September 1977, American had, by direct arrangement with Century, granted Century a one-container allocation aboard Flight 841, subject to a right on American's part to break such shipment out of containerization and carry it loose.

A few weeks after the referral of the case, Congress, on November 9,1977, enacted Public Law 95-163 in anticipation of the preparatory year for deregulation. Part of that enactment was the new 1002 (k) of the Act; 49 U.S.C. §1482 (k), projecting common carrier status for the carriage of air cargo into the era of deregulation.

More than two years elapsed between the primary jurisdiction session of October 21, 1977 and the initiation of the CAB Enforcement Proceeding in the Complaint of the CAB's Bureau of Consumer Protection ("Bureau") of December 14, 1979. Inactive as the case may have been, it was not an uneventful period.

In July 1978 two unrelated events occurred; 1) the CAB announced its intention with respect to the carriage of cargo and to be effective November 9, 1978, to suspend the requirement under section 404 (a) of the Act, 49 U.S.C. §1374 (a) imposing on carriers the duty to carry on rea-

sonable request, and, 2) Shulman Air Freight ceased operations thereby opening 3 of Flight 841's 12 main deck positions for reallocation.

With respect to the Shulman space Century again requested the allocation of some of the vacated space, but got none, the vacated positions being allocated in August 1978 to three relative newcomers hitherto very light in the New York-Puerto Rico trade.

The CAB held public hearings regarding the proposed new regulations for cargo carriage on October 19, 1978. This was followed by the enactment on October 24, 1978 of the Airline Deregulation Act, Public Law 95-504, and the CAB's promulgation, on November 9, 1978 of its General Rules for All-Cargo Carriers, ER-1080; 43 Federal Register 53,620, 53,631 (November 16, 1978) which, while purporting to exempt air freight carriers from the duty to carry on reasonable request, also recognized the common carrier status mandated by § 1002 (k) of the Act, and thus reconciled the administrative action with the statutory mandate:

> "This exemption [from duty to carry], however does not relieve the carriers of their service obligations as common carriers * * *. Carriers holding certificates under section 401 or 418 of the Act remain, by definition, common carriers. * * * This exemption, therefore, only ends the Board's role in regulating the extent of the carrier's service offerings, * * *."

The Administrative Decision to Issue Complaint

On June 22, 1979 the Director of the Bureau wrote separate letters to counsel for Century and for American, respectively advising them of the Bureau's intention to institute an enforcement proceeding against American for violation of the Aviation Act's § 404 (b) prohibiting unfair discrimination and undue preferencing. While feeling that American's actions also violated antitrust, the Bureau

had already unilaterally decided not to prosecute on that account. Thus the letter to American's counsel:

> "We have also concluded, on the basis of information presently available, that there are reasonable grounds to believe that American's practice constituted a violation of Section 1 of the Sherman Act. Specifically, we find it is inconsistent with the 'essential facility' doctrine perhaps best enunciated in *Hecht* v. *Pro-Football, Inc.*, 570 F. 2d 982 (D.C. Cir. 1977) [cert. den. 436 U.S. 956 (1978)]. The relevant market at issue here is confirmed air freight traveling from New York City to San Juan, Puerto Rico on regularly scheduled cargo service. American's service constituted a facility essential to successful operations in this market. Since, as a practical matter, air freight forwarders are unlikely to be able to duplicate these services, they should be allocated on fair terms. Therefore, in foreclosing the use of American's services, both American and Profit-By-Air may have violated the antitrust laws. *Hecht, supra,* 570 F. 2d at 992; *see also, Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1972). By implication, any such violations would also constitute unfair methods of trade within the meaning of Section 411 of the Federal Aviation Act. See, *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683 (1948). • • •
>
> "By July 29, 1979, the Bureau will determine what further course of action should be taken here."[10] • • •

American's response to the Bureau's letter was a position letter of September 18, 1979 admitting the special and protected relationship between Profit By Air, Inc. and American, where Profit By Air had the exclusive car-

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"[10] We have already decided to take no action of our own in response to Century's antitrust claim. Our reasons for doing so are stated more fully in our letter to Century's counsel, • • •."

riage of the entire pharmaceutical industry of Puerto Rico and regularly filled 8 northbound container positions on Flight 840. American's preferencing of Profit By Air was admitted but defended as necessary to "meet competition", since American felt that yielding of any Profit By Air space to Century would likely cost American its best customer.

That yielding *any* space at all aboard Flight 841 to Century would hardly be appealing to Profit By Air became at once apparent the following month when one of Shulman Air Freight's successors to its container allocation gave up its one-container position allocation because it had lost its principal customer to Century. For seven weeks in October and November, 1979 Century had a second container allocation aboard Flight 841 and thus had a significant one-sixth of the Flight's main deck capacity as against the token one-twelfth. This could not be abided and American withdrew the allocation from Century under a new policy announcement that henceforth, starting with Century, vacated container positions would not be allocated but would be filled each night on *ad hoc* spot demand. The remaining eleven main deck positions would be grandfathered to the existing allocation holders until severally relinquished by a process of attrition. Thus was Century cut back to the one-customer allocation given it after the initiation of the district court suit.

On December 14, 1979 the Bureau issued its administrative complaint alleging:

> "• • • American has provided the only regularly scheduled all-cargo service between New York and San Juan departing during prime time on weekdays. • • •",

and,

> "By denying the requests of forwarders seeking actively to compete in the New York-San Juan cargo market for commitments for main deck positions on

> Flight No. 841 in favor of providing continuous, standing commitments to incumbent forwarders, American has violated Section 404 (b) of the Act. This practice has caused the public injury by denying it the benefits of fully competitive freight forwarding service in this market and by preventing new entrants from being established in this market."

The relief requested by the Bureau would, *inter alia*, require

> "• • • American Airlines, Inc. to cease and desist from allocating space on its southbound freighter operating between New York, New York and San Juan, Puerto Rico in an unjustly discriminatory manner and to institute reasonable practices with respect to its providing main deck space for the transportation of air freight in this market."

The issuance of the formal administrative complaint instituting the Board's enforcement proceeding marked the point at which the CAB, relinquishing its absolute right under an unchallengeable public interest determination provided by § 411 of the Act (49 U.S.C. § 1381) *not* to prosecute a proceeding, nevertheless elected to go forward and thereby become bound to follow applicable rules of substantive and procedural law subject to judicial review under the Administrative Procedures Act, 5 U.S.C. § 706. At that point Century's status as a party to the administrative proceeding was established and, with that status, it became entitled to a Board disposition in accordance with law and due process guarantees.

American answered the administrative complaint and several prehearing conferences were held before two successive administrative law judges. The case never went to hearing. Instead the parties—Bureau, American and Century—went into settlement conferences from which Century early dropped out of participation.

Finally, on August 13, 1980, the Bureau brought on its motion before Administrative Law Judge Switkay to approve the settlement—consisting of Appendicies "A", a Memorandum of Agreement between the Bureau and American, and "B", the Allocation System, both of which are identical with the Appendices "A" and "B" annexed to the subject final Order of the CAB constituting Appendix 2 to this petition. Also annexed to the motion papers was a proposed consent order which was considerably modified by the administrative law judge in his actually issued Consent Order of April 17, 1981 constituting Appendix 3 to this petition. The motion for approval of the settlement and proposed consent order submitted therewith are set forth in Appendix 5 to this petition.

It is the settlement agreement—Memorandum of Agreement and Allocation System—which we feel is the heart of the case for certiorari. Like any written instrument, and especially contractual instruments under the parol evidence rule, construction is for the tribunal passing upon it and in an unambiguous instrument such as this, that construction is a matter of law. The fuzziness of the language used in the Allocation System is deliberate, not ambiguous; its purpose is to hint at, but not impose, criteria and restraints. Nowhere does it compel a change in the southbound allocations existing before the CAB asserted its primary jurisdiction of the cause with eight positions for Profit By Air and one position for Century. Even the concession of one southbound position as of right for each steady northbound shipper of one or more containers—the only truly binding provision in the agreement—is deliberately designed to assure that no shipper—like Century—can ever, against American's will, get more than one southbound container allocation on Flight 841. At the same time the great bulk of the container positions are put in American's sole discretion for disposition in an annual reallocation that requires no changes whatsoever if no changes are what American desires. Of the 12 north-

bound positions, of which Profit By Air holds eight on allocation and Century hold two, the one container as of right provision assures that one each is pledged to Profit By Air and Century, leaving a minimum of eight at American's disposal, plus possibly one or two more as there are or are not steady northbound shippers using the remaining two container positions. Add to this that the settement agreement positively discourages the voluntary award to Century of a second or third container allocaion aboard Flight 841 since for Century, and Century alone, additional positions aboard that flight are objects of special trade. Thus Appendix A, the Memorandum of Agreement between the Bureau and American:

> "10. It is understood that American may, consistent with the requirements of the allocation system contained in Appendix B to the Consent Order, allocate reserved main deck "A" container positions on Flight No. 841 to Century as part of any resolution of the private suit now pending between American and Century."

And where for all of this unbridled control in the selection and rejection of customers for allocation of space on Flight 841, where the Bureau had been of the opinion that both the antitrust and aviation acts were being violated and had initiated its enforcement proceeding for appropriate cease and desist remediation, it is ironic that the Bureau had now come full circle and now validates a panorama of virtually absolute control by American of access to its essential facility, Flight 841.

Century's Comments of August 28, 1980, submitted in opposition to the Bureau's motion to approve the settlement, raises the objections urged at each stage of the review procedure. The principal ground for opposition was that the settlement violated the common carrier strictures against customer selection and rejection by carriers, and discriminatorily did away with the common carrier

requirement for equitable proration among customers tendering goods for shipment where space was not adequate to meet the aggregate demand. Thus:

> "• • • Rather it seems plain that Congress, by enacting section 1002 (k) and 102 (a)(7) was mandating to the Board the duty to preserve common carrier principles alive among the all-cargo carriers, i.e., to accommodate all shippers tendering the kinds of cargo American would carry, and where such demand exceeded the space, accommodating as equitably as possible, proportionaely within the practicalities of a rule of reason, the allocations of available space."

The Comments also raised the objection that the proposed settlement allowing American to exclude shipper customers from its essential facility was, especially in view of the common carrier status of the faciity, violative of sections 2 and 1 of the Sherman Act and, derivatively, of § 411 of the Aviation Act.

Century's Comments of August 28, 1980 are in Appendix 6 to this petition.

It was not until April 17, 1981 tha a third administrative law judge, Hon. John M. Vittone, issued his Consent Order No. 81-4-116 (Appendix 3 hereto) approving the settlement agreement—the Memorandum of Agreement and the Allocation System—in its entirety. While none of the decsional orders and Judgment in the case mention § 1002 (k) of the Act, Judge Vittone's Consent Order does make solitary mention of the phrase "common carrier":

> "Century has objected to this settlement on the stated grounds that the allocation system grants American 'a right of unbridled customer selection', and would permit American to discriminate against Century in violation of the antitrust laws and common carrier obligations. We find no basis for these objections. Nothing in the allocation system authorizes or makes

it easier for American to select customers unlawfully or improperly, and substantial limitations have been placed upon American's discretion to ensure against unjust discrimination."

While making it plain that carrier selection of what it deems the "better customers" is perfectly legal, Judge Vittone's Consent Order also seemed to cast doubt on the validity of Century's antitrust claims and hinted that perhaps the settlement agreement extinguished them.

Century petitioned the CAB to review the Consent Order on May 1st, 1981 reiterating the same grounds urged against the Bureau's motion to the administrative law judge. That petition is in Appendix 6 to this petition.

On July 29, 1981 the Board issued its Order No. 81-7-138 (Appendix 2) which, with the Judgment confirming it, is the subject of this petition. Like the Consent Order which it affirmed, it makes valiant rhetorical effort to demonstrate that, beyond American's obligation to furnish one southbound annual container allocation to those steadily shipping one or more northbound containers, the agreement really did put some sort of binding limitation on American's otherwise boundless discretion in the selec- and rejection of customers, a search which examination of the agreement cannot reward.

Unlike the administrative law judge, the CAB Order held that the settlement agreement and the two orders approving it, indeed the administrative enforcement proceeding itself, never touched upon or affected the antitrust suit:

"We also disagree with Century's contention that the settlement validates American's prior practice, for it requires American to allocate space according to certain specified criteria and to pay $50,000 in civil penalties. American will no longer be able to follow its prior allocation practices. In addition, this settlement does not purport to determine whether or not Century should prevail in its private suit against American.

> "Finally, Century's contention that American has been violating the Sherman Act does not require disapproval of the settlement. As agreed to by Century's counsel at the beginning of this proceeding, this case concerns only the allegation that American had violated Section 404(b)'s prohibition against unjust discrimination. The antitrust issues presented by Century's district court suit, on the other hand, were never encompassed within this proceeding. Those issues were reserved for trial in the district court suit. Accordingly, Century's antitrust claims provide no basis for disapproving the settlement before us."

While the facts will readily demonstrate that there was no consent by Century's counsel to amputate the antitrust case out of its common and indivisible fact matrix in the district court and administrative cases, it still does not follow that the CAB need not concern itself with the antitrust implications of a settlement whose legal validity it is declaring by its Order of approval; and all the more where a violation of antitrust is, derivatively and necessarily, a violation of section 411 of the Aviation Act.

The Court below, whose jurisdictional base was § 1006 of the Aviation Act, 49 U.S.C. § 1486, dismissed Century's petition to review in its unpublished Memorandum Judgment of April 21, 1982 (Appendix 1). The grounds advanced were that there was no reversible error in the agency action, no requirement for the CAB "to resolve petitioner's antitrust claims if, given the terms of the settlement, further proceedings were not in the public interest", and seeming approval of the CAB holding that Century's antitrust action was not prejudiced by the CAB Order which "does not state or imply that American's

conduct between 1971 and 1981 did not violate the anti-trust laws."

Not in the record are the following facts. In the beginning of August 1981, American executed a change of schedule which substituted a daytime daily freighter and discontinued Flight 841. Counsel for American, on May 8, 1981, gave written notice of the planned change of schedule to the CAB and to all the parties and participants of record in the administrative proceeding. Nevertheless the CAB, with evident care, attention and awareness of the importance and public interest of and in the questions with which it was dealing, issued its subject Order herein —oriented to the merits and validity of a system of selection of cargo shippers for annual allocations of space— with the date of issue July 29, 1981, just two days before the last flight of Flight 841. The route itself is actively maintained by American and there is no physical hindrance at any time to American's reactivating Flight 841.

Argument in the Court below was almost totally directed to the issue of mootness, but the Memorandum Judgment which issued in the following week was directed wholly to the merits of the case under review.

We feel that, unlike the formula invocation of public interest or lack of public interest in the administrative determination to go forward or to dismiss, pursuant to § 411 of the Act, the public interest in the purely legal and fundamental question which this case presents—the meaning and impact of § 1002 (k) of the Act on the basic rules for air transportation of cargo in the era of deregulation— is intense. We strongly urge the Court to grant certiorari and act on the merits of the case, for if it does not, the ambious rule laid down by the CAB which neither mentions § 1002 (k) nor the concept, let alone mandate, for common carriage, will prevail for an indefinite time. We feel that Congress by enacting § 1002 (k) intended the industry's footing to be on a basis of common carriage.

In this connection we feel that *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290 (1897) is potent authority for retention and merit adjudication, p. 307:

> "The defendants object to the hearing of this appeal, and ask that it be dismissed on the ground that the Trans-Missouri Freight Association has been dissolved by a vote of its members since the judgment entered in this suit in the court below
>
> "• • • we think the fact of dissolution of the association does not prevent this court from taking cognizance of the appeal and deciding the case upon its merits.
>
> "The prayer of the bill filed in this suit asks not only for the dissolution of the association, but, among other things that the defendants should be restrained from continuing in a like combination and that they should be enjoined from further conspiring, agreeing, or combining and acting together to maintain rules and regulations and rates for carrying freight upon their several lines etc. The mere dissolution of the association is not the most important object of this litigation. The judgment of the court is sought upon the question of the legality of the agreement itself for the carrying out of which the association was formed, and if such agreement be declared to be illegal, the court is asked not only to dissolve the association named in the bill but that the defendants should be enjoined for the future."

ARGUMENT

The Court of Appeals has decided important questions of federal law which have not been but should be settled by this Court.

1. **The impact, meaning and application of the 1977 Congressional mandate of § 1002 (k) of the Aviation Act, 49 U.S.C. § 1482 (k), imposing common carrier status and obligations upon freight air carriers in the interest of protecting the shipping public in the era of deregulation ought to be settled here to evaluate the validity of a Civil Aeronautics Board settlement allowing a direct air carrier to select or reject shipper customers as the carrier perceives its own best economic interest, and to refuse reasonable requests for the service it holds itself out as offering to the public. Such adjudication is both necessary for the proper disposition of this case and would resolve fundamental questions of great public importance at the very threshold of air transport deregulation.**

That § 1002 (k) of the Act has direct and important bearing on this case is at once apparent. Invoked by Century from its very emergence as a statute, both the agency and the Court of Appeals refuse to come to grips with it and it goes unmentioned in all three of the decisional papers of Court and agency. One inference is clear; if the statute had been deemed supportive of the agency action, it would not have been left to languish in silence and under a bushel.

While some may have viewed the statutory provision as of little or no consequential effect on the power of the agency to establish, implement and help a cherished policy of setting up for the air cargo carriage industry a *laissez faire* deregulated market economy akin to the private sector, where supply and demand, profitablity and the avoidance of loss, allowance of large room for the exercise

of entrepreneurial brains, and the like, would all hopefully result in an economically healthy industry standing on its own two feet, no one of that belief and commitment could have viewed § 1002(k) as a help to the cause. Left to slumber as a dead letter, it would do no harm. Brought out to be discussed of record, it does have a potential for precipitating a clash if it is viewed as a Congressional mandate at odds with agency policy, and, if indeed there is a clash, the mandate must prevail.

In this instance we feel that the anticompetitive, market rigging power given to American was more than was good for it or for the industry. Century is urging here that the solicitude of the agency for the industry it is turning loose into a frustrating deregulation is, morally and ethically, at least matched by the solicitude of Congress for the shipping public, a manufacturing, mercantile and commercial community who generally, with regard to transportation services, stand nowhere near equal on a bargaining footing with their carriers. In this situation where law is the arbiter, we feel that the common carriage mandated by Congress cannot be allowed to be subverted by conflicting administrative policies. But even more than Century's feelings as to who has the right of it, we feel it is objectively demonstrable that this Court ought to take the case in hand by granting certiorari.

We feel that when Congress, in its enactment of § 1002 (k) of the Act, said "* * * the term 'interstate air transportation of property' means * * * the carriage by aircraft of property as a common carrier for compensation or hire * * *", it meant just what it said and had no intention of having the basic, well understood phrase "common carrier" distorted into meaning something which is the very opposite of the common understanding of the term. Yet the Bureau's motion states:

> "Beyond the initial guarantee that anyone providing northbound shipments will be given one re-

served southbound allocation, the allocation system permits American to select customers based upon factors directly related to profitability * * *."

The term "common carrier" has a commonly accepted meaning going back, deep and broad, to a common law fundament. See, e.g., 10 Williston on Contracts (3d Ed. 1967), pp. 2-24. Thus, at pp. 6, 7:

> "It was formerly the merest truism that there were but two classes of carrier: the private carrier and the common or public carrier."

and thus defines a common carrier, p. 11:

> "A common carrier undertakes to transport for hire goods or passengers or both for all who reasonably apply, according to the method of transportation which it offers to the public."

and at p. 13:

> "The common carrier status imposes the common-law relational duties of rendering to the public on reasonable demand a reasonable service at reasonable rates and without unreasonable discrimination."

That a right of customer selection is an important legal attribute in the private enterprise sector is recognized and sanctioned by statute. Thus the pertinent portion of 15 U.S.C. § 13 (a) of the Clayton Act:

> "* * * *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transaction and not in restraint of trade."

And see *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919), where McReynolds, J. said:

> "* * * In the absence of any purpose to create or maintain a monopoly, the act does not restrict the

> long recognized right of a trader or manufacturer engaged *in an entirely private business,* freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell. 'The trader or manufacturer, on the other hand, *carries on an entirely private business,* and can sell to whom he pleases.' *United States* v. *Trans-Missouri Freight Association,* 166 U.S. 290, 320." (emphasis supplied)

United States v. *Trans-Missouri Freight Association,* 166 U.S. 290, 320, 321 (1891), makes the distinction between strictly private business and enterprise having a public character. There Peckham, J. said:

> "* * * It is said that this meaning is plainly to be inferred, because of *fundamental* differences both in an economic way and before the law between trade and manufacture on the one hand, and railroad transportation on the other. Among these differences are the public character of the railroad business, and as a result the peculiar power of control and regulation possessed by the State over railroad companies. The trader or manufacturer, on the other hand, carries on an entirely private business and can sell to whom he pleases * * * he may make such discrimination in his business as he chooses, and he may cease to do any business whenever his choice lies in that direction; while, on the contrary, a railroad company must transport all persons and property that come to it, and it must do so at the same price for the same service, and the price must be reasonable, and it cannot at its will discontinue its business." (emphasis supplied)

It is therefore both strange and strained that with the language of a statute recently enacted so plain, unambiguous and direct as § 1002 (k) of the Act, and explicitly

using the phrase "common carrier", that the Board should use a construction so perversely contrary and descriptive of the opposite of common carrier as the "fair" method. That construction defies a plain mandate of Congress and ought not to be allowed to stand.

The Board Order generates a rule that unless overruled and corrected will enslave the shipping public, force them to negotiate terms as with a contract carrier, or forego transportation which has been pre-empted by the preferenced.

Nor is there any persuasive argument for making the situation of an excess of tendered shipments over available space into an occasion empowering the carrier to preference his favored shippers and reject the others. In such a situation, the status of common carrier requires equitable proration:

> "First, where the demand for space exceeds the supply, a common carrier must equitably prorate its available space among shippers. * * *" *Banana Distributors, Inc.* v. *Grace Line, Inc.*, 5 F.M.B. 278, 284 (1957)

And see: *Pennsylvania Railroad Co.* v. *Puritan Coal Co.*, 237 U.S. 121 (1915)

United States v. *Baltimore & O. R. Co.*, 165 Fed. 113 (4 Cir. 1908), reversed on other grounds, 215 U.S. 481 (1910)

The Court below cited its decision in *National Small Shipments Traffic Conference* v. *CAB*, 618 F. 2d 819 (D.C. Cir. 1980) as the authority supporting the CAB Order "allowing American Airlines to refuse reasonable requests for service on such a flight." We think that *National Small Shipments* is consistent with the narrow construction given by the CAB in its General Rules for All-Cargo Carriers of November 9, 1978 (page 5 of this petition) which

limits the administrative exemption of the "duty to carry" provision of § 404 (a) of the Act in a way not to conflict with carriers' continuing common carrier obligations:

> "This exemption, however, does not relieve the carriers of their service obligations as common carriers • • •. At common law, a carrier is permitted to hold itself out as a carrier of only a particular kind of freight, and is not obligated to carry other types of cargo. This exemption therefore, only ends the Board's role in regulating the extent of the carriers' service offerings • • •."

and the case addresses itself to petitioners who are specialty shippers fearful that their categories of goods would be excluded. Thus, 618 F. 2d 819, 832:

> "• • • For the most part, the Shippers' claim rests on their belief that the Board's action [exempting carriers from the statutory duty to carry on reasonable request] will encourage carriers to refuse to carry certain types of cargo, for example, live animals or radioactive materials. • • •
>
> "• • • Given this, the Board reasonably concluded that the market system could be expected to resolve the problem of unpopular cargo under the more competitive conditions now allowed. • • •"

In this case American's service offering is the carriage of containerized cargo and the ground of exclusion has rarely, if ever, addressed itself to the nature of the contents. We petition in this case because the Court below has directly adjudicated that the CAB's exemption of the duty to carry upon reasonable request provision of section 404 (a) of the Act is absolute to whatever extent such action is held not to be in conflict with section 404 (b). To the extent that *National Small Shipments* is now held to approve as valid a general suspension of carriage obligations beyond the self-imposed narrow interpretation of

the CAB, we believe it erroneously transgresses upon rights and obligations mandated by § 1002 (k) of the Act, and, in that sense, reinforces our point that the Court of Appeals has decided an important question which only now, at the petition stage, is before this Court.

Here we claim that § 1002 (k) of the Aviation Act, fastening the status of common carrier upon American is violated by the CAB Order sanctioning selection and rejection of shipping customers on the carrier's appraisal of their comparative value to it as customers. Such violation of its own Act has long been held subject to review and remediation by the courts. Thus in *Federal Maritime Board* v. *Isbrandtsen Co., Inc.*, 356 U.S. 481 (1958) the Shipping Act forbade "resort to other discriminating or unfair methods" an dthe egency found that the dual rate system approved was fairly designed to meet competition—the same argument advanced by American to justify its preferencing Profit By Air. The Supreme Court, per Brennan, J., struck down the agency action, saying at p. 493:

> "Since the Board found that the dual-rate contract of the Conference was a 'necessary competitive measure to offset the effect of non-conference competition' required 'to meet the competition of Isbrandtsen in order to obtain for its members a greater participation in the cargo moving in this trade, it follows that the contract was a 'resort to other discriminating or unfair methods' to stifle outside competition in violation of § 14 Third."

And see *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726 (1973), where Marshall, J., said at p. 745, 746 regarding the deference due a longstanding administrative misconstruction of law:

> "But the Commission contends that since it is charged with administration of the statutory scheme, its construction of the statute over an extended period should

be given great weight. See, *e.g.*, *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944). This proposition may, as a general matter, be conceded, although it must be tempered with the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate. * * * It is sufficient to note that the cases do not demonstrate the sort of longstanding, clearly articulated interpretation of the statute which would be entitled to great judicial deference, particularly in light of the clear indications that Congress did not intend to vest the Commission with the authority it is now seeking to assert. As this Court held in a related context,

> " 'The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a "reasonable basis in law," . . . But the courts are the final authorities on issues of statutory construction, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385, and "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deemed inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 390 U.S., at 272.
>
> "In this case, we find that the Commission overstepped the limits which Congress placed on its jurisdiction."

See, also: *Federal Security Administration* v. *Quaker Oats Co.*, 318 U.S. 218, 228 (1943)

In enacting § 1002 (k) of the Aviation Act, Congress mandated common carriage status and obligations as the governing characteristic for air transportation of prop-

erty. In this case where we feel that application of the statute is highly material, and where the public importance of the issue is manifest, both the Court below and the agency have, without even mentioning the statute, taken action which we believe is violative of it. We urge that a material Act of Congress expounding important public policy ought to be discussed, evaluated and applied and, for the foregoing reasons, respectfully pray this Court to grant certiorari.

2. It was error to allow the CAB, without hearing and refusing to rule an antitrust, to hold as valid under the Aviation Act the same practices complained of as violative of antitrust; practices prevailing when the administrative complaint had issued. The CAB has a duty to inquire the legality of its orders under any applicable law, and it cannot leave Century with the burden of convincing the district court that the same practices found valid under the Aviation Law are also violative of antitrust.

In this application for certiorari we make no secret of the primacy for consideration and settlement by this Court of the issue of the meaning and impact of § 1002 (k) upon both the statutory and administrative scheme of deregulation. The issues tendered under this second heading are more diffuse; basically concerned with federal due process rights of litigants whose litigation has been moved into an administrative agency under the doctrine of primary jurisdiction. If certiorari is granted, and especially if the settlement terms are found invalid, the issues of this second point will necessarily have to be considered.

The settlement agreement comes off the top of a significant series of events; it is two-dimensional and is utterly lacking in depth. Thus, it ignores over six years of total embargo from June 1971 to September, 1977. Even assuming that the exemption of the duty to carry on reasonable

request in § 404 (a) is unqualified and not limited only to service offerings, the settlement agreement and the Court below treat the right of refusal to carry on reasonable request as though it had existed at all pertinent times when in fact, for Century, it was enduring over seven years of naked violation of that statutory duty, from June 1971 to November 9, 1978. And, of course, all of the advantages gained by American and Profit By Air to Century's great disadvantage in those glaring illegalities find no recognition in the settlement agreement.

Century's transfer into the jurisdiction of the CAB was not voluntary. Bringing suit before any of the deregulation legislation, American made the motion for primary jurisdiction and Century, refusing to be a complainant before the CAB, agreed that the presence of its prayer for Clayton Act injunctive relief entitled the CAB to take the case if the CAB so elected, and the CAB was advised it could accept or decline primary jurisdiction as it chose. It was the CAB that decided to exercise primary jurisdiction over the case and in doing so the CAB represented to the district court that, if it issued administrative complaint, it would try the whole case, reserving the issue of money damages to the court. The district court complaint was treated as Century's formal complaint in the CAB.

On June 22nd, 1979 the Bureau wrote to Century and to American via their separate counsel giving in detail its conviction that American was violating both the Aviation Act and the Sherman Act, the latter by denying access to Century aboard American's Flight 841, an essential facility within the meaning of *Hecht* v. *Pro-Football, Inc.*, 570 F. 2d 982 (D.C. Cir. 1977), cert. denied 436 U.S. 956, but that the Bureau had decided it would proceed only on a charge of violation of § 404 (b) of the Act —illegal discrimination and preferencing. And to this announcement, at a time when no complaint had issued and Century had no right of recourse, the Bureau made

the following proposal for amputating antitrust from the indivisible facts:

"In contrast to an antitrust suit, an administrative proceeding limited to issues arising under Section 404(b) of the Federal Aviation Act could probably be litigated on summary judgment without unduly taxing the Bureau's limited resources. On the other hand, an antitrust suit would likely require a full trial and the presentation of expert testimony. Since the public's protection can be ensured without proceeding with Century's antitrust claim in addition to the one arising under the Federal Aviation Act, we must decline to do so.

"We recognize, however, that the manner in which we received Century's complaint strongly militates against the outright dismissal of its antitrust claim. Therefore, instead of doing so, we suggest that one of two courses of action be followed if Century chooses to continue to prosecute its antitrust claim. First, we invite you to take the initiative of filing a formal third-party complaint on your own with the Board. In that event, I would encourage both parties to submit expert evidence to determine whether a complaint should be docketed. If I decided to do so, the matter could be litigated directly by Century and American with the Bureau participating almost as *amicus curiae*, a procedure recently followed in *Braniff Airways, Inc.* v. *Texas International Airlines, Inc.*, Docket 32872.* Second, Century could return the matter to Federal Court after the completion of administrative proceedings. If this procedure were followed, the Bureau would provide assistance to the Court if called upon to do so. Regardless of which procedure is employed, Century would have the discretion of determining the future of its suit, which we believe is fair given the case's history."

The unbearable prospect in the Bureau's first proposal with two trials of the same facts, burden of proof on the Bureau in the Aviation Act case, burden of proof on Century in the antitrust case (should the Bureau not exercise its veto, without recourse, against administrative trial of the third-party antitrust claim) made the second option by far the lesser of the two evils, and so Century opted in a procedure not so different as the return to district court for assessment of damages after successful administrative proceedings.

Later the Board was to chide Century for having "consented" to the amputation.

And when finally the Bureau issued its Orders, without hearing, approving as valid under the Aviation Act, exactly the practices that were in effect *prior* to the referral of the case to the CAB, it becomes impossible to conclude that Century has not been deprived of its property in its antitrust suit without the due process of a hearing. For it does no good to assure Century that its antitrust suit—after a mauling of five years—is not impaired by the administrative and judicial holdings confirming the validity of its Aviation Law action and holdings. Courts look to the administrative action, especially if it has been judicially confirmed, to evaluate both the law and the facts. Thus *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973), at 305:

> "We also think it very likely that a prior agency adjudication of this dispute will be a material aid in ultimately deciding whether the Commodity Exchange Act forecloses this antitrust suit, * * *."

and even more pointedly in *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363, 380 (1973):

> "* * * it would be odd to hold that an affiliation between an air carrier and others that would pass muster under §408 could nevertheless run afoul of the antitrust laws."

Patently once a party litigant comes into the rights of a party under 5 U.S.C. § 706, he is entitled to have his legitimate litigating rights preserved. Here the CAB represented its ability to hear and adjudicate Century's entire case save for assessment of damages. It should be held to that representation.

CONCLUSION

For the foregoing reasons, petitioner earnestly prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Dated: July 20 1982.

APPENDIX 1

Memorandum Judgment Sought to Be Reviewed.

NOT TO BE PUBLISHED—SEE LOCAL RULE 8 (f)

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 81-2021

CENTURY AIR FREIGHT, INC., Petitioner

v.

CIVIL AERONAUTICS BOARD, Respondent
AMERICAN AIRLINES, INC., Intervenor

[No Opinion]
September Term, 1981
CAB 81-7-138
United States Court of Appeals
for the District of Columbia Circuit
FILED APR 21 1982
GEORGE A. FISHER
Clerk

Petition for Review of an Order of the Civil Aeronautics Board.

Before WRIGHT, TAMM, and GINSBURG, Circuit Judges.

JUDGMENT

This cause came on to be heard on a petition for review of an order of the Civil Aeronautics Board approving the terms of a settlement between intervenor American Airlines and the Board's Bureau of Compliance and Consumer Protection. The issues have been briefed and argued by counsel, and the court has accorded them full consideration. They do not occasion a need for an opinion. *See* Local Rule 13(c).

Petitioner has asserted that the Board made several errors of law and abused its discretion in approving the settlement at issue in this case. We find petitioner's claims meritless. The terms of the settlement do not authorize American Airlines to operate an overnight, all-cargo flight between New York and San Juan in violation of Section 404(b) of the Federal Aviation Act, 49 U.S.C. § 1374(b) (1976). Nor was there error in allowing American Airlines to refuse reasonable requests for sevice on such a flight. 14 C.F.R. § 291.31(a)(2) (1980); *see Nat'l Small Shipments Traffic Conference* v. *CAB*, 618 F. 2d 819, 831-832 (D.C. Cir. 1980). Neither the Board nor the Bureau was required to resolve petitioner's antitrust claims if, given the terms of the settlement, further proceedings were not in the public interest. We note that the order under review expressly states that it is not intended to prejudice petitioner's pending suit against American, and the order does not state or imply that American's conduct between 1971 and 1981 did not violate the antitrust laws. In all other respects as well, the Board's order is free from reversible legal error, and is supported by substantial evidence in the record.

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the petition for review is hereby dismissed.

Per Curiam
For the Court
GEORGE A. FISHER
George A. Fisher
Clerk

APPENDIX 2

Order of Civil Aeronautics Board Affirming Consent Order of Law Judge, July 29, 1981 (Annexing Settlement Agreement, Appendices "A" and "B").

Order 81-7-138

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.
Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.,
on the 29th day of July, 1981

SERVED JUL 1981

Docket 37278

AMERICAN AIRLINES, INC. NEW YORK-SAN JUAN CARGO SERVICE

Enforcement Proceeding

ORDER

This enforcement proceeding against American challenged the legality of American's method of allocating reserved container space on its overnight New York-San Juan all-cargo flight. In the complaint instituting this case the Bureau of Compliance and Consumer Protection (the Bureau) asserted that American's longstanding method of allocation violated Section 404(b) of the Federal Aviation Act, 49 U.S.C. 1374(b), which prohibits unjust discrimination. Before a hearing was held the Bureau and American agreed on a settlement of this case. That settlement was approved by Administrative Law Judge John M. Vittone in Order 81-4-116 (April 17, 1981). One air freight forwarder in the New York-San Juan

market, Century Air Freight (Century), opposed the settlement below and has now petitioned us to reverse the law judge's approval of it. For the reasons given below, we have determined that his decision should be affirmed.

The flight at issue here, American flight number 841 from New York to San Juan, has twelve container positions on the main deck of the B-707 aircraft used for the flight. This overnight flight is attractive to air freight forwarders and other shippers because it provides them next-morning delivery in San Juan. As a result, the number of container positions has long been inadequate to meet the demand for such space. From 1971 to 1978 American allocated eight of the twelve positions to Profit by Air, Inc., three to Shulman Air Freight, and one to Emery Air Freight. When Shulman withdrew from the market in 1978, seven forwarders, including Century, asked for a reserved position. American gave one each to Air Express International Corporation, Burlington Northern Air Freight, Inc. and Bor-Air Freight. Earlier, in 1977, American allocated the equivalent of a container position ot Century, but Century has alleged that its shipment have often broken out of their container, thus subjecting Century to a higher frequency of loss and more trouble in taking its cargo off the plane in San Juan. While Century had requested a reserved container position numerous times, it was never able to obtain one.

The administrative law judge approved the settlement since he found that it provided a fair resolution of the case, Order 81-4-116, p. 3:

> [The agreed-upon allocation system] addresses whatever effects American's practice might have had on the route, guarantees a fair opportunity to all shippers to compete for access to American's service, and is also tailored to meet American's legitimate business needs. The system limits all reservations to one

year and requires American to consider applications each year from all forwarders and shippers using basically the same criteria, regardless of whether they have previously held reservations on the flight. All shippers who tender shipments for the relatively less sought after northbound segment will be guaranteed at least one reserved southbound position, and all remaining positions will be allocated according to criteria which take into account this and other factors affecting American's likely yield.

He found unwarrated Century's concerns that the settlement would give American unbridled discretion in allocating space or allow it to unlawfully discriminate against Century.

Century has petitioned for review of his approval of the settlement, a petition opposed by American and Emery Air Freight.[1] Century charges that the settlement allows American to continue "an illegal unbridled exercise of customer selection and rejection" in violation of Sections 404(b) and 411 of the Act. Century also asserts that the settlement "would validate the prior exclusionary and discriminatory practices of customer selection and rejection" causing the issuance of the Bureau's complaint, since "it requires no change whatsoever in the anticompetitive practices of American * * * and the southbound allocation for northbound shippers makes no change in the actual practices [previously] prevailing * * *." In addition, according to Century, the settlement violates the antitrust laws. American's New York-San Juan flight is an "essential facility" under the reasoning of *Hecht* v. *Pro-Football Inc.*, 570 F.2d 982 (D.C. Cir., 1977), since

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[1] Emery, which has held one of the container positions on American's New York-San Juan flight, is participating in this case pursuant to Rule 214 of the Board's Rules of Practice, 14 C.F.R. 302.214.

access to reserved container space on that flight is vital to any forwarder's ability to compete in the New York-San Juan market.[2] As a result, the Sherman Act prohibits any settlement which would allow American to arbitrarily allocate space on that flight. Finally, Century asserts that the settlement "would validate the prior exclusionary and discriminatory practices of customer selection and rejection" since "it requires no change whatsoever in the anticompetitive practices of American * * * and the southbound allocation for northbound shippers makes no change in the actual practices [previously] prevailing * * *."

As a result, Century filed an antitrust suit in federal district court against American in which Century sought treble damages for, *inter alia*, American's alleged unlawful refusal to give Century more space on the New York-San Juan flight. Because of American's intention to seek dismissal of the suit on the ground that the Board had jurisdiction, Century stipulated that the case should be referred to the Board under the doctrine of primary jurisdiction. The district court then stayed further proceedings while the Board investigated Century's allegations.

After informally investigating American's conduct, the Bureau determined that American's allocation of space on flight no. 841 appeared to violate Section 404(b) of the Act and filed the complaint instituting this proceeding. The Bureau's complaint requested that American be ordered to cease and desist from allocating space on the flight in violation of Section 404(b), to institute a

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[2] In the *Hecht* case a professional football team allegedly used a condition in its stadium lease to block an applicant for another football franchise in the same city from using the stadium, the only one in the metropolitan area suitable for football, so as to maintain its monopoly in the market. There the court held that a business could not keep competitors from using an essential facility on fair terms if the facility could not be duplicated.

reasonable method of allocating space and to pay civil penalties. While the Bureau believed that American also may have engaged in an unfair competitive practice in violation of Section 411 of the Act, 49 U.S.C. 1381, the Bureau chose not to include such a charge in its complaint. Instead the Bureau advised Century's counsel that he could either file a complaint based on that charge here if he wished the Board to investigate that issue or renew his antitrust claims in the district court proceeding on completion of the Section 404(b) Board proceeding. Century's counsel chose the latter alternative.

In response to the Bureau's complaint American denied that it had acted unlawfully in its allocation of space on the New York-San Juan flight. Among other things, American alleged that its allocation of space was required by economic factors, such as its need to give preference to those forwarders who provided freight for the return flight from San Juan to New York, a flight for which there was relatively little demand.

Before any hearing was held, however, American and the Bureau agreed to settle the case without further litigation. While not admitting that the allegations in the Bureau's complaint were true, American agreed to contest neither their validity nor tht findings and conclusions in the proposed consent order. American also agreed to pay $50,000 in civil penalties and to adopt a new method of allocating space on the New York-San Juan flight. In brief, American will grant all forwarders and shippers at least one reserved container position on the New York-San Juan flight if they regularly use one such position on tht return flight from San Juan to New York, allocate the remaining positions according to various economic criteria set out in the settlement agreement, and review these allocations annually. The settlement was opposed by Century, which argued that it gave American too much

discretion in allocating container space in violation of both the Act and the Sherman Act. In response, the Bureau and American contended that the settlement would not give American such unbridled discretion.

In response, American asserts that the allocation method specified by the settlement agreement satisfies the requirements of Section 404(b). In addition, the "essential facility" doctrine of antitrust law is allegedly inapplicable to a service provided by a person who does not compete with the persons using the facility, and in any event the antitrust issues presented by American's practice were not before the Board and should be heard by the district court.

In our view, Century's objections do not provide a basis for disapproving the settlement between the Bureau and American. Since there is more demand for reserved container positions than there are positions, American obviously must use some method of allocating the available positions among the shippers requesting them. The method agreed upon by American and the Bureau appears to us to satisfy the requirements of Section 404(b) and therefore to be a fair means of settling this case. We disagree with Century that the settlement gives American unlimited discretion in allocating container space. Thus each forwarder using a space on the northbound flight receives a space on the southbound flight. American must allocate the remaining space on the basis of such economic criteria as the weight and type of cargo likely to be tendered by each applicant, the applicant's ability to tender cargo for the northbound flight, and other factors affecting the revenues and costs of American's New York-San Juan service. In addition, American must repoen the allocation annually and thus can not follow its earlier practice of maintaining position reservations for years without change. We therefore agree with the law judge's

conclusion that "[n]othing in the allocation system authorizes or makes it easier for American to select customers unlawfuly or improperly, and substantial limitations have been placed upon American's discretion to ensure against unjust discrimination," Order 81-4-116, p. 3. Furthermore, other than charging that the settlement gives American unlimited discretion, Century has not explained how the settlement's allocation method will injure it, nor has Century suggested any alternative means of allocating container positions which would be both fair and practicable.

We also disagree with Century's contention that the settlement validates American's prior practice, for it requires American to allocate space according to certain specified criteria and to pay $50,000 in civil penalties. American will no longer be able to follow its prior allocation practices. In addition, this settlement does not purport to determine whether or not Century should prevail in its private suit against American.

Finally, Century's contention that American has been violating the Sherman Act does not require disapproval of the settlement. As agreed to by Century's counsel at the beginning of this proceeding, this case concerns only the allegation that American had violated Section 404(b)'s prohibition against unjust discrimination. The antitrust issues presented by Century's district court suit, on the other hand, were never encompassed within this proceeding. Those issues were reserved for trial in the district court suit. Accordingly, Century's antitrust claims provide no basis for disapproving the settlement before us.

Accordingly, the Board affirms the approval of the settlement agreed to by American Airlines, Inc. and the Bureau of Compliance and Consumer Protection.

By the Civil Aeronautics Board:

Phyllis T. Kaylor
Secretary

(Seal)

All Members concurred.

APPENDIX 2 (ANNEXES)

Settlement Agreement—Appendix A, Memorandum of Agreement.

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

AMERICAN AIRLINES, INC.
NEW YORK-SAN JUAN CARGO SERVICE
Enforcement Proceeding

Docket 37278

MEMORANDUM OF AGREEMENT

The Bureau of Consumer Protection ("Bureau") and the respondent, American Airlines, Inc. ("American") by their respective attorneys agree, solely for the purpose of settling this proceeding without the need for further litigation, as follows:

1. American and the Bureau consent to entry by the Civil Aeronautics Board of a final order in the form of the draft order attached to this memorandum.

2. American neither admits nor contests any of the facts alleged in the Bureau's complaint in this docket, and it neither admits nor contests any of the findings of fact, characterizations and inferences drawn from such facts, or the conclusions of law stated in the draft Consent Order.

3. It is the intention, understanding and agreement of American and the Bureau that neither this memorandum, the Consent Order, nor any facts, conclusions or inferences contained therein shall have any collateral estoppel or *res judicata* effect outside this Board proceeding. For

this purpose, "this Board proceeding" means the present enforcement action by the Bureau in Docket 37278, and does not include the private action now pending in the Southern District of New York against American by Century Air Freight, Inc. ("Century"), or any other action except for an action by the Board for enforcement of the Consent Order to be entered herein. Without limiting the foregoing, American and the Bureau further specifically intend that neither this memorandum, the Consent Order, nor any of the facts, conclusions or inferences contained therein shall have any collateral estoppel or *res judicata* effect, or be used as evidence of any violation of law, in that private action.

4. American agrees to pay $50,000 in full settlement of all alleged violations by American described in the Bureau's complaint and the Consent Order.

5. American expressly acknowledges that the Consent Order to be entered restrains it from engaging in certain practices regarding allocation of reserved main deck "A" container space on its overnight New York to San Juan all-cargo service and contains affirmative duties regarding future such practices, and American consents to be bound thereby.

6. American waives all right to notice, hearing and appeal in connection with the entry of the Consent Order.

7. In the event the Board should seek to enter the Consent Order in a future proceeding or court action to enforce the Consent Order, American shall be precluded from disputing the findings and the conclusions of law contained in the Order, or the validity of the Order itself.

8. The Bureau shall submit this agreement and the attached draft order to the Administrative Law Judge assigned to this proceeding in accordance with Rule 215

of the Board's Rules of Practice, together with a motion requesting approval and entry of the Order pursuant to the authortiy delegated under 14 C.F.R. 385. American waives its right under Rule 215(b) to submit further written comments on the settlement except in response to comments submitted by persons other than the Bureau.

9. The Bureau agrees that it will not initiate any additional enforcement action against American based upon the method of allocating reserved main deck "A" container positions on Flight No. 841 at issue in this proceeding.

10. It is understood that American may, consistent with the requirements of the allocation system contained in Appendix B to the Consent Order, allocate reserved main deck "A" container positions on Flight No. 841 to Century as part of any resolution of the private suit now pending between American and Century.

11. This agreement is subject to approval by the Board, and if such approval is withheld, the agreement shall be terminated and have no further effect.

AMERICAN AIRLINES, INC.

By: MARTIN FREDRIC EVANS
Andrew C. Hartzell, Jr., Esq.
Martin Frederic Evans, Esq.
Debevoise, Plimpton, Lyons
& Gates

Date: August 19, 1980

BUREAU OF CONSUMER PROTECTION

By: JAMES D. TUSSING
James D. Tussing, Esq.
Senior Trial Attorney

Date: 8/12/80

APPENDIX 2 (ANNEXES)

Settlement Agreement—Appendix B, Allocation System

APPENDIX B

ALLOCATION SYSTEM

Until December 31, 1984, American Airlines, Inc. (American) will follow the procedures outlined below for allocating Confirmed Air Freight ("CAF")[1] A container mand for CAF A container positions exceeds the number of positions available:

(1) American will keep a record of all requests for daily CAF A container space on Flight No. 841 from freight forwarders and shippers.

(2) Each January American will contact each forwarder and each shipper which has requested but not been accorded such space in the preceding calendar year and will determine whether and to what extent that forwarder or shipper desires daily CAF A container space for the entirety of the next 12-month period. American will not be obligated to consider requests for A container space on less than a daily, year-round, fully-rated (general commodity rate) basis.

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[1] Confirmed Air Freight is American's name for freight carried for others on a recurring basis pursuant to reservations, as described more fully in paragraph (7), *infra*.

positions on its New York to San Juan all-cargo Flight No. 841, or any successor service[2] concerning which de-

[2] Hereafter, the term "Flight No. 841" is used to refer to the flight which is currently so designated, and to any successor service. The term "successor service" refers to any American all-freight flight which replaces or supplements the current Flight No. 841 and which is regularly scheduled to provide overnight delivery of freight from New York, New York to San Juan.

(3) American will then evaluate each such request as well as similar requests from any forwarder or shipper which has been accorded CAF A container space on a recurring basis during the prior year and will allocate CAF A container space on Flight No. 841 according to the following procedure:

(A) American will evaluate each request for CAF A reference to the following factors:

(i) the applicant's financial stability and credit worthiness, as determined by its payment record with American (if any) and other factors normally used in making such an assessment;

(ii) the credibility of the applicant's request based on:

(a) if the applicant has previously been accorded CAF space on Flight No. 841 or on other American flights, the consistency and nature of the applicant's utilization of such space;

(b) the applicant's prior utilization of space on other New York-San Juan flights;

(c) the volmue of the applicant's current shipments of freight between New York and San Juan; and

(d) any other relevant facts presented by the applicant or known to American.

(B) To the extent permitted by CAF space on Flight No. 841, American will allocate one standard CAF A container position[3] for one year to each shipper or

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[3] A standard CAF A container position shall be capable of transporting intact a shipper-tendered A container.

forwarder which requests one or more such positions, which offers to provide American northbound return-flight freight on a daily, year-round full-rated (general commodity rate) A container basis, and which meets American's criteria of credibility and credit worthiness, as outlined in subparagraph (A) above.

(C) American will allocate for one year any remaining CAF A container positions based upon the following factors, as they affect revenues and costs:

(i) the anticipated average weight, density, rate and type of shipments to be tendered by the applicant;

(ii) the applicant's ability and willingness to supply American with northbound, return-flight freight; and

(iii) such other factors pertaining to the applicant's shipments of freight between New York and San Juan which affect American's revenues or costs on any of its flights between New York and San Juan.

(4) American will also use the procedure established herein to allocate any CAF A container space which becomes available during the year. Such allocations shall run until the next annual reallocation takes place.

(5) In determining who will be allocated CAF A container positions, American will not favor applicants which have held or are holding such positions on Flight No. 841 over applicants who have not held such positions. However, American may consider such prior usage in assessing an applicant's credibility, creditworthiness and the potential yield of the applicant's shipments, as set forth in subparagraphs (3)(A) and (3)(C).

(6) American will not be obligated under this allocation system to continue to operate Flight No. 841, to continue to operate Flight No. 841 on its current schedule, or to make any alternative arrangements for shippers or forwarders using Flight No. 841 in the event of termination of the flight or a schedule alteration.

(7) In accordance with the standard operation of American's CAF procedures, a CAF allocation will not constitute a commitment by American to carry any such freight or a commitment by the shipper to tender any such freight. If a shipper or forwarder accorded a position does not tender freight in substantially the amount of its allocation and in accordance with normal air freight business practices, or otherwise fails to satisfy the criteria established in the preceding paragraphs, American may withdraw the allocation at any time.

APPENDIX 3

Consent Order of Law Judge April 17, 1981

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Issued Under Delegated Authority
April 17, 1981

Order 81-4-116

Docket 37278

SERVED APR 22 1981

AMERICAN AIRLINES, INC.
NEW YORK-SAN JUAN CARGO SERVICE

Enforcement Proceedings

CONSENT ORDER

The Bureau of Consumer Protection ("Bureau")[1] commenced this proceeding on December 14, 1979, alleging that American Airlines, Inc. ("American") violated section 404(b) of the Federal Aviation Act by unjustly discriminating against various air freight forwarders in allocating space in its New York-San Juan overnight cargo flight, currently designated American's Flight No. 841. The Bureau alleged that American's manner of allocating space on this flight caused public injury by preventing development of a fully competitive freight forwarding service between New York and San Juan. The complaint requested that American be ordered to cease

[1] On December 15, 1980 the Bureau of Consumer Protection became the Bureau of Compliance and Consumer Protection.

and desist from allocating space on Flight No. 841 in an unjustly discriminatory manner, to institute reasonable allocation practices with respect to main deck "A" container space on this flight, and to pay civil penalties. American answered denying the substantive allegations of the Bureau's complaint and specifically denying any violations of the Act.

On August 12, 1980, prior to any adjudication of facts, American and the Bureau entered into a memorandum of agreement (Appendix A to this Order) to settle this matter without the need for further litigation. American has not admitted any of the allegations of the Bureau's complaint; but solely for the purposes of settlement, American has agreed for this proceeding not to contest the allegations stated in the Bureau's complaint or the findings and conclusions set forth in this Consent Order. American has also agreed, for purposes of settlement, to adopt the proposed allocation procedures set forth in Appendix B to this Consent Order. The statement of those procedures in Appendix B is controlling, but they can be summarized as follows. American will: (1) grant all forwarders and shippers which will regularly utilize at least one "A" container position on the less desirable northbound return segment of the flight at least one reserved container position on the southbound, New York-San Juan segment; (2) allocate the remaining positions on the southbound segment, if any, according to the criteria set out in Appedix B; and (3) review and issue or reissue such allocations once a year. American has also agreed to pay $50,000 in full settlement of any civil penalty liability.

The Bureau alleges the facts to be as follows. Since 1971, American has operated the only regularly scheduled, overnight all-cargo service on week nights from New York to San Juan (originally designated Fight No. 801, now Flight No. 841). Access to this service is desirable for

air freight forwarders competing, or seeking to compete, on this route because the flight is scheduled so that shippers in New York can have next morning delivery in San Juan. However, since 1971, various forwarders have held allocations of indefinite duration for all twelve of the main deck "A" type cargo container positions in the Boeing 707 aircraft American has used in this operation. From late 1971 through mid-1978, all twelve such positions available were allocated to three forwarders—eight to Profit By Air, Inc., three to Shulman Air Freight, and one to Emery Air Freight. In August 1978, when Shulman withdrew from this route, seven forwarders asked American to take Shulman's place, seeking a total of between nine and eleven positions. The three Shulman positions were subsequently divided among Air Express International Corporation, Burlington Northern Air Freight, Inc., and Bor-Air Freight.

The Bureau has further alleged that during the period from 1971 to 1977, Century Air Freight, Inc. ("Century"), an air freight forwarder based in New York, made numerous requests for positions on American's flight. Each Century request during that period for an indefinite allocation of "A" container space was denied on the ground that all available space was committed. In May 1977, Century sued American in Federal District Court in New York, claiming that American had engaged in an unlawful restraint of trade in violation of the Sherman Act by agreeing with Profit By Air to deny Century space, and that American's actions also violated the Federal Aviation Act. In September 1977, American allocated Century the equivalent of one "A" container position on Flight No. 841. However, Century contends that its freight has often been broken out of its container and fitted into whatever space is available on the aircraft, subjecting Century to greater recovery time and higher

frequency of loss than if its freight were containerized. In August 1978, Century sought unsuccessfully at least one of the three Shulman positions then available.

This matter came to the Bureau's attention when American and Century stipulated that certain issues should be referred to the Board under the doctrine of primary jurisdiction. At the parties' request, the District Court stayed further judicial proceedings pending action by the Board on Century's complaint. Following an investigation, the Bureau filed its complaint in this proceeding.

The complaint alleges specifically that since American began its overnight all-cargo service from New York to San Juan in 1971, American has allocated to a few forwarders all the desirable positions on these flights—namely the main deck "A" container positions—for an indefinite period. When American allocates such a position to a forwarder, that forwarder has a right to the position as against any other forwarder, until such time as American or the forwarder alters the arrangement. Such alterations are rare, however. From late 1971 to mid-1978, the same three forwarders held all twelve standard main deck "A" container positions on the flight. The Bureau contends that this indefinite preference for some forwarders for an extensive period of time, and indefinite exclusion of others seeking the American service, violates section 404(b).

American has denied any violation of section 404(b) and has raised affirmative defenses to the Bureau's complaint. American does not admit the legal or factual contentions of the Bureau. However, for the purposes of settling this proceeding, and subject to the conditions and limitations of the memorandum of agreement, American consents to the entry of this Consent Order.

Therefore, on the basis of the Bureau's factual and legal contentions, and American's agreement not to contest

them in this proceeding, we find that American violated section 404(b) in its indefinite allocations of space on Flight No. 841. *Transcontinental Bus System, Inc.* v. *C.A.B.*, 383 F.2d 466 (5th Cir. 1967), cert. denied, 390 U.S. 920 (1968); *Emery Air Freight and Air Midwest, Inc.*, Order 73-4-8 (April 2, 1973). We also find that the allocation system which American has agreed to implement in order to settle this proceeding will provide a fair resolution of this particular case. It addresses whatever effects American's practice might have had on the route, guarantees a fair opportunity to all shippers to compete for access to American's service, and is also tailored to meet American's legitimate business needs. The system limits all reservations to one year and requires American to consider applications each year from all forwarders and shippers using basically the same criteria, regardless of whether they have previously held reservations on the flight. All shippers who tender shipments for the relatively less sought after northbound segment will be guaranteed at least one reserved southbound position, and all remaining positions will be allocated according to criteria which take into account this and other factors affecting American's likely yield.

Century has objected to this settlement on the stated grounds that the allocation system grants American "a right of unbridled customer selection", and would permit American to discriminate against Century in violation of the antitrust laws and common carrier obligations. We find no basis for these objections. Nothing in the allocation system authorizes or makes it easier for American to select customers unlawfully or improperly, and substantial limitations have been placed upon American's discretion to ensure against unjust discretion.

Although the system now agreed to is to operate until December 31, 1984, there is no requirement that American

continue to operate overnight service; the system is applicable only if American chooses to continue to offer such a service, and if demand for reserved positions on the service exceeds supply. If, however, unexpected contingencies arise, or American believes that it or its customers have become unduly burdened by this allocation method, our order expressly provides that American can apply to the Board for appropriate modifications. Moreover, we will look favorably upon such an application if American can demonstrate that this method of allocating reserved space is unduly hindering the profitability of its flight, since our intention in issuing this order is not to intrude upon the exercise of American's business judgment within the limits of the law.

ACCORDINGLY,

1. We approve the settlement agreed to by American Airlines, Inc. and the Bureau of Compliance and Consumer Protection.

2. American Airlines, Inc. is ordered to cease and desist from engaging in any unjust discrimination against forwarders, within the meaning of section 404(b) of the Act, in its allocation of reserved "A" container positions on its overnight all-cargo service between New York and San Juan.

3. American shall deliver to the Director, Bureau of Compliance and Consumer Protection, a check or draft made payable to the Treasurer of the United States in the amount of $50,000 within 7 days of the date this order becomes a final order of the Board.

4. American shall follow the procedures set out in Appendix B to this order until December 31, 1984 in allocating reserved "A" container positions on its overnight all-

cargo service from New York to San Juan. American may apply to the Board at any time for modification of this procedure, and such modification shall be granted upon a showing (i) that the procedure is unduly hindering the profitability of American's service and is unnecessary to prevent unjust discrimination or the effects of any past unjust discrimination; or (ii) that modification is warranted by changes in applicable law or regulations.

5. This order is issued by authority delegated in 14 C.F.R. 385.11. Persons entitled to petition the Board for review of this order under Board regulations, 14 C.F.R. 385.50, shall file their petitions within 10 days of the date of service of this order. This order shall be effective as final action of the Civil Aeronautics Board after the 10 day period, unless a timely petition for review is filed or the Board takes review on its own within that period.

6. This proceeding is terminated.

By John M. Vittone
Administrative Law Judge

PHYLLIS T. KAYLOR
Secretary

(SEAL)

The Settlement Agreement:

Appendix "A"—Memorandum of Agreement
Appendix "B"—Allocation System
is annexed to APPENDIX 2 hereof (Board Order No. 81-7-138) (July 29, 1981)

APPENDIX 4

Petitioner's Appendix of Statutory Texts.

CIVIL AVIATION ACT OF 1958, AS AMENDED, INCLUSIVE OF THE AIRLINE DEREGULATION ACT OF 1978

Section 102 (a) (7); 49 U.S.C. § 1302 (a) (7):

"*§ 102. Consideration of matters in public interest by Board*

Factors for interstate, overseas, and foreign air transportation

(a) In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

• • • •

(7) The prevention of unfair, deceptive, predatory, or anticompetive practices in air transportation, and the avoidance of—

(A) unreasonable industry concentration, excessive market domination, and monopoly power; and

(B) other conditions;

that would tend to allow one or more air carriers or foreign air carriers, unreasonably to increase prices, reduce services, or exclude competition in air transportation."

As amended Pub. L. 95-504, § 3(a), (b) Oct. 4, 1978, 92 Stat. 1705, 1707.

Appendix 4

Section 404 (a) and (b); 49 U.S.C. § 1374 (a) and (b):

"§ 404. Rates for carriage of persons and property; duty to provide service, rates, and divisions; foreign air transportation rates; discrimination

(a) (1) It shall be the duty of every air carrier to provide and furnish interstate overeas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe and enforce just and reasonable individual and joint rates, fares and charges, and just and reasonable classifications, rules, regulations and practices relating to such air transportation; and, in case of joint rates, fares charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

(2) It shall be the duty of every air carrier and foreign air carrier to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to foreign air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers and foreign air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers or foreign air carriers.

(b) No air carrier or foreign air carrier shall make, give, or cause any undue or reasonable preference or advantage to any particular person, port, locality, or descrip-

tion of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Pub. L. 85-726, Title IV, § 404, Aug. 23, 1957, 72 Stat. 760; Pub.L. 92-259, § 1, Mar. 22, 1972, 86 Stat. 95.

1978 amendment of § 404 (a) (1) of the Act

"*§ 404. Rates for carriage of persons and property; duty to provide service, rates, and divisions; foreign air transportation rates; discrimination*

(a) (1) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers authorized to engage in schedule air transportation by certificate or by exeption under section 416 (b)(3) of this title; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation, and, in case of such joint rates, fares and charges, to establish just, reasonable and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any such participating air carriers."
As amended Pub.L. 95-504, § 23, Oct. 24, 1978, 92 Stat. 1724.

Appendix 4

Section 411; 49 U.S.C. § 1381:

"§ 411 Methods of competition

The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods or competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition."
Pub.L. 85-726, Title IV, § 411, Aug. 23, 1958, 72 Stat. 769
Section 412: 49 U.S.C. § 1382

(Old text superseded Oct. 24, 1978)

"§ 412. Pooling and other agreements; filing; approved by Board

(a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalities, bonds or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy,

and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it."

Pub.L. 85-726, Title IV, § 412, Aug. 23, 1958, 72 Stat. 770.

(New text, enacted October 24 1978)

"§ 412. *Pooling and other agreements; filing and approval of agreements*

(a) (1) Any air carrier or foreign air carrier may file with the Board a true copy, or, if oral, a true and complete memorandum, of any contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise), or a request for authortiy to discuss possible cooperative working arrangements in force on October 24, 1978, or thereafter entered into, or any modification or cancellation thereof, between such air carrier or foreign air carrier and any other air carrier, foreign air carrier, or other carrier.

(2) (A) The Board shall by order disapprove any contract, agreement, or request filed pursuant to para-

graph (1) of this subsection, whether or not previously approved by it, that it finds to be adverse to the public interest or in violation of this chapter, and shall by order approve any contract, agreement, or request, or any modification or cancellation theerof that it does not find to be adverse to the public interest, or in violation of this chapter, except that—

(i) The Board may not approve or, after periodic review, continue its approval of any such contract, agreement, or request, or any modification or cancellation thereof, which substantially reduces or eliminates competition, unless it finds that the contract, agreement, or request is necessarry to meet a serious transportation need or to secure important public benefits, including international comity or foreign policy considerations, and it does not find that such need can be met or such benefits can be secured by reasonably available alternative means having materially less anticompetitive effects;

(ii) the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it; and

(iii) the Board may not approve any such contract or agreement, affecting interstate or overseas transportation, or any modification or cancellation in markets in which they compete, that fixes rates, fares or charges between or among air carriers (Except for joint rates, fares or charges).

(B) In any proceeding before the Board involving the application of the standards set forth in subparagraph (A)(1) of this paragraph the party opposing the proposed contract, agreement, or request shall have the burden of

aproving the reduction or elimination of ocmpetition, and the availability of alternative means having less anticompetitive effects, and the party defending the proposed contract, agreement, or request shall have the burden of proving transportation need or public benefits.

(C) The findings required by subparagraph (A) (1) of this paragraph shall be included in any order of the Board approving or disapproving any contract or agreement or any memorandum of any contract or agreement, or any modification or cancellation thereof, or any request.

Proceedings upon filing

(b) Upon the filing of any contract or agreement, or any modifiiation or cancellation thereof, or any request for authority to discuss possible cooperaative working arrangements, pursuant to subsection (a) of this section, the Board, in accordance with regulations which it prescribes, shall provide to the Attorney General the Secretary of State, and the Secretary of Transportation written notice of, and an opportunity to submit written comments on, the filed document. The Board may, upon its own initiative or if requested by the Attorney General or either Secretary hold a hearing, in accordance with regulations prescribed by the Board, to determine if a contact or agreement, or request for discussion authority, whether or not previously approved is consistent with the provisions of this chapter.

Mutual aid agreements"

[This sequence of subsections deals with mutual aid for strikebound airlines and is omitted]

As amended Pub.L. 95-504, secs. 28(a)(2), (b), (c), 29 (a), Act. 24, 1978, 92 Stat. 1729, 1730; Pub.L. 96-192, sec. 11, Feb. 6, 1980, 94 Stat. 39.

(Old text, superseded October 24, 1978)

Appendix 4

Section 414; 49 U.S.C. § 1384

" § 414. Legal restraints

Any person affected by any order made under sections 408, 409, or 412 of this title shall be, and is hereby, relieved from the operations of the 'antitrust laws', as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

Pub.L. 85-726, Title IV, § 414 Aug. 23, 1958, 72 Stat. 770

(New text, enacted October 24 1978)

§ 414. Antitrust exemption

In any order made under section 408, 409, or 412 of this title, the Board may, as part of such order, exempt any person effected by such order from the operations of the 'antitrust laws' set forth in subsection (a) of section 12 of Title 15 to the extent necessary to enable such person to proceed with the transaction specifically approved by the Board in such order and those transactions necessarily contemplated by such order, except that the Board may not exempt such person unless it determines that such exemption is required in the public interest. Notwithstanding the preceding sentence, on the basis of the findings required in subsection (a)(2)(A)(i) of section 412 of this title, the Board shall, as part of any order under such section which approves any contract, agreement or request or any modification or cancellation thereof, exempt any person affected by such order from the operations of the 'anti-trust laws' set forth in subsection (a) of section 12 of title 15 to the extent necessary to enable such person to proceed with the transaction specifically ap-

proved by the Board in such order and with those transactions necessarily contemplated by such order.

As amended Pub.L. 95-504, § 30(a), Oct. 24, 1978, 92 Stat. 1731; Pub.L. 96-192, § 27, Feb. 15, 1980, 94 Stat. 47.

Sherman Antitrust Act of 1890, as amended

Section 1; 15 U.S.C. § 1

"§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contact or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guiilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.

Section 2; 15 U.S.C. § 2

"2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the disretion of the court."

Appendix 4

As amended Dec. 21, 1974, Pub. 1 93-528, § 3, 88 Stat. 1708. 1708.

Administrative Procedures Act, 5 U.S.C. § 706

"§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

APPENDIX 5

Motion to Law Judge for Approval of Settlement.

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Docket 37278

Aug. 12, 1980

AMERICAN AIRLINES, INC.
NEW YORK-SAN JUAN CARGO SERVICE

Enforcement Proceeding

MOTION TO APPROVE SETTLEMENT

The Bureau of Consumer Protection ("Bureau") and American Airlines, Inc. ("American") have reached an agreement for settling this proceeding. The Bureau hereby asks the Administrative Law Judge, under the authority delegated in 14 C.F.R. 385.11, to approve the settlement by issuing the attached Consent Order.

The Bureau's complaint alleges that American has violated section 404(b) of the Federal Aviation Act by unjustly discriminating against Century Air Freight Inc. ("Century") and other air freight forwarders in allocating space on its New York-San Juan prime time cargo flight since late in 1971, shortly after the flight began. Specifically, the Bureau alleges that American granted some forwarders open-ended reservations for all desirable positions on its flight—namely, the twelve main deck "A" container positions—and then refused to grant reservations to any other forwarders until one of those holding a reservation relinquished it. Since demand for the reserved positions consistently exceeded supply, very few forward-

ers have relinquished reservations during the entire history of the flight. Indeed, the same three forwarders occupied all of the reserved positions for seven years, until one of them—Shulman Air Freight—released its positions in 1978. The Bureau contends that this indefinite preference for some forwarders for a prolonged period of time, and indefinite exclusion of others, violate section 404(b). The Bureau also alleges that American's manner of allocating space on this fight caused public injury by preventing development of a fully competitive freight forwarding service in this market.

In response to the Bureau's contentions (which are set out more fully in the Consent Order), American argues that its practice in allocating reserved "A" container positions on Flight No. 841—which American calls "Confirmed Air Freight"—are necessary to permit shippers to engage in efficient planning and to permit American to insure maximum utilization of its fight. American describes its Confirmed Air Freight as an understanding between the shipper and carrier that an agreed-upon volume of freight will be tendered on a regular basis and that normally space will be held on the fight for the carriage of that freight. There is no penalty if freight is not tendered or if it is not carried as anticipated, and the understanding is terminable at will by either party.

Americn contends that this practice is the same as the reserved air freight practice considered on several prior occasions by the Board without any finding of illegality, and that it is used widely in the industry. American asserts that it is not required to displace customers utilizing positions on the flight simply in order to accommodate a newcomer. American also alleges that there are other flights competitive with Flight No. 841, and that a forwarder's inability to obtain a Confirmed Air Freight position on Flight No. 841 would not signficantly injure that forwarder or freight forwarding competition between New York and San Juan.

Appendix 5

American states that it offered Confirmed Air Freight space on its overnight freighter on a first-come, first-served basis, that Century was offered space in 1971 on such a basis and rejected it, and that Century's subsequent requests for recurring reservations of space could not be satisfied by American because the flight had been filled. American contends that freight which it has carried for Century has been subject to no greater recovery time or higher frequency of loss than that experienced by other shippers using container space on the flight.

American also asserts that the allocation of a significant number of southbound positions on Flight No. 841 to Profit By Air—which has regularly utilized eight reserved positions—is necessary to maintain he flight, since Profit By Air also provides American with a significant quantity of northbound, return-flight freight. While there is generally a sufficient level of southbound freight, northbound freight is more scarce. Without Profit By Air's round-trip business, American argues, it would be unable to operate the flight economically. American alleges that if Profit By Air were offered less space than it now holds on the souhbound flight, it would charter its own aircraft or find other alternative lift. Thus, American contends that its system of allocating space on Flight No. 841 is economically necessary to maintain the flight and to retain its customers.

For the purpose of reaching a settlement and final disposition of the issues involved here and to avoid further litigation, American has entered into the attached Memorandum of Agreement, in which it agrees not to contest the facts alleged in the Bureau's complaint, and the facts, inferences and legal conclusions stated in the Consent Order. American also agrees to entry of the Consent Order itself; expressly acknowledges and agrees to be bound by the provisions of the Order, which both restrain it from engaging in certain practices regarding

allocation of reserved "A" container space on its New York-San Juan overnight all-cargo service, and require it to undertake affirmative duties regarding such practices; and agrees to pay $50,000 in civil penalties, in full settlement of all violations described in the Bureau's complaint and the Order. American has also waived its right to submit further comments on the settlement except to respond to comments submitted by others.

In the Bureau's judgment, the settlement is in the public interest, brings to a satisfactory conclusion a complex and lengthy enforcement proceeding, and should be approved. The cease and desist portion of the Consent Order enjoins American from engaging in unjust discrimination against forwarders in its allocation of reserved "A" container positions on its overnight all-cargo service between New York and San Juan. The Order also requires American to implement an allocation system—originally proposed by American—which we believer will remedy the effects of American's discriminatory practice on the market, guarantee a fair opportunity to all shippers to compete for access to American's service, and also meet American's legitimate business needs.

Under the method of allocation required by the Order, American will: (1) grant all forwarders and shippers which will regularly utilize at least one container position on the less sought after northbound return leg of the flight at least one reserved container position on the southbound, New York-San Juan segment; (2) allocate the remaining positions on the southbound segment according to criteria which take into account American's need for northbound shipments and other factors affecting American's revenue yield between New York and San Juan; and (3) review and issue or reissue such allocations once a year. Although the Order requires American to follow this method of allocation until December 31, 1984, it does not require

American to continue to operate overnight service between New York and San Juan; the allocation system is required only if American chooses to offer such a service, and if demand for reserved positions on the service continues to exceed supply.

This settlement agreement is consistent with the initial referral of this matter to the Board, which occurred after Century filed a private action against American in Federal District Court in New York, alleging that American violated the Sherman Act and the Federal Aviation Act in excluding it from this flight. American and Century stipulated to a referral of the dispute to the Board and requested a stay of the judicial proceeding pending the Board's review. The Court approved the stipulation and granted the stay, without itself formally ordering referral to the Board or issuing any instructions to it. Even if the Court had formally referred this matter to the Board, however, the Board would retain its normal discretion to determine whether to institute an enforcement action, or to proceed in some other manner. *See Alaska Airlines, Inc.* v. *Western Airlines, Inc. and Northwest Airlines, Inc.*, Order 77-9-122, p. 4.

In its review of this matter, the Bureau considered possible violations by American of Section 403, 404 and 411 of the Act, as well as possible violations of the Sherman Act. The Bureau concluded that the public interest would be fully protected by pursuing a remedy under Section 404 only, and this settlement secures relief—including a modification of the allocation system initially challenged in the court action—in settlement of these Section 404 claims. By resolving the matter in this fashion, the Board will have more than satisfied its responsibilities under the primary jurisdiction doctrine.

Century has declined to enter into this settlement and has objected to the allocation system required by the Consent Order on the ground that it permits American too

much discretion in choosing customers. We believe that this objection is baseless. The allocation system represents a balance between the need to ensure that all forwarders and shippers—whether currently on the flight or not—have a fair and equal opportunity to compete, on the basis of economic considerations, for access to the American service, and the policy, under deregulation, of minimizing government interference with a carrier's exercise of its business discretion. American's discretion will be restricted, but in a manner acceptable to it and consistent with the economic realities of this market.

One key economic consideration in this market is directional imbalance; substantially more freight is shipped by air southbound than northbound, and therefore obtaining the relatively scarce northbound shipments is important to operating a profitable round-trip flight. The allocation system accommodates this economic factor, and guarantees fair access to the American service, by providing that anyone who can regularly provide American at least one daily northbound container will be granted a southbound position. Competition for space on the flight is further facilitated by limiting all allocations of reserved positions to one year, and providing that American will review all applications for space and issue or reissue all allocations on a yearly basis. Beyond the initial guarantee that anyone providing northbound shipments will be given one reserved southbound allocation, the allocation system permits American to select customers based upon factors directly related to profitability, including solicitation of northbound shipments and density and type of goods to be tendered.

Nothing in this system authorizes or makes it easier for American to engage in unlawful discrimination or improper selection of customers. American has made a substantial concession to facilitating competition among forwarders in this market by agreeing to restrict alloca-

tions of reserved space to one year and to grant all forwarders who can provide northbound shipments at least one southbound position on its flight. Furthermore, since it is not anticipated that the initial grant of one southbound position too each shipper providing northbound shipments will fill the southbound flight, American is required to select additional customers based upon factors which reflect the economic features of this market. Additional restriction on American's discretion, we believe, would be both unnecessary and unwarranted.

WHEREFORE, the Bureau requests that the settlement be approved under delegated authority by issuance of the attached Consent Order, the terms of which have been negotiated and agreed to by American and the Bureau, and that this proceeding be terminated.*

Respectfully submitted,

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Bureau of Consumer Protection

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Bureau of Consumer Protection

DAYTON LEHMAN, JR.
Dayton Lehman, Jr.
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Bureau of Consumer Protection

August 12, 1980

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* See PR-217 and OR-160, revising the procedures for settlement of enforcement proceedings, effective December 28, 1979.

The settlement agreement submitted with the motion papers and consisting of Appendix "A"—Memorandum of Agreement, and Appendix "B"—Allocation System, is identical with Appendices "A" and "B" set forth in APPENDIX 2 of this petition.

APPENDIX 5 (ANNEX)

Proposed Consent Order Annexed to Motion

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Issued under Delegated Authority

Docket 37278

AMERICAN AIRLINES, INC.
NEW YORK-SAN JUAN CARGO SERVICE

Enforcement Proceeding

CONSENT ORDER

The Bureau of Consumer Protection ("Bureau") commenced this proceeding on December 14, 1979, alleging that American Airlines, Inc. ("American") violated section 404(b) of the Federal Aviation Act by unjustly discriminating against various air freight forwarders in allocating space on its New York-San Juan overnight cargo flight, currently designated American's Flight No. 841. The Bureau alleged that American's manner of allocating space on this flight caused public injury by preventing development of a fully competitive freight forwarding service between New York and San Juan. The complaint requested that American be ordered to cease and desist from allocating space on Flight No. 841 in an unjustly discriminatory manner, to institute reasonable allocation practices with respect to main deck "A" container space on this flight, and to pay civil penalties. American answered denying the substantive allegations of the Bureau's complaint and specifically denying any violations of the Act.

Appendix 5

On August 12, 1980, prior to any adjudication of facts, American and the Bureau entered into a memorandum of agreement (Appendix A to this Order) to settle this matter without the need for further litigation. American has not admitted any of the allegations of the Bureau's complaint; but solely for the purposes of settlement, American has agreed for this proceeding not to contest the allegations stated in the Bureau's complaint or the findings and conclusions set forth in this Consent Order. American has also agreed, for purposes of settlement, to adopt the proposed allocation procedures set forth in Appendix B to this Consent Order. The statement of those procedures in Appendix B is controlling, but they can be summarized as follows. American will: (1) grant all forwarders and shippers which will regularly utilize at least one "A" container position on the less desirable northbound return segment of the flight at least one reserved container position on the northbound, New York-San Juan segment; (2) allocate the remaining positions on the southbound segment, if any, according to the criteria set out in Appendix B; and (3) review and issue or reissue such allocations once a year. American has also agreed to pay $50,000 in full settlement of any civil penalty liability.

The Bureau alleges the facts to be as follows. Since 1971, American has operated the only regularly scheduled, overnight all-cargo service on week nights from New York to San Juan (originally designated Flight No. 801, now Flight No. 841. Access to this service is desirable for air freight forwarders competing, or seeking to compete, on this route because the flight is scheduled so that shippers in New York can have next morning delivery in San Juan. However, since 1971, various forwarders have held allocations of indefinite duration for all twelve of the main deck "A" type cargo container positions in the Boeing 707 aircraft American has used in this opera-

tion. From late 1971 through mid-1978, all twelve such positions available were allocated to three forwarders—eight to Profit By Air, Inc., three to Shulman Air Freight, and one to Emery Air Freight. In August 1978, when Shulman withdrew from this route, seven forwarders asked American to take Shulman's place, seeking a total of between nine and eleven positions. The three Shulman positions were subsequently divided among Air Express International Corporation, Burlington Northern Air Freight, Inc., and Bor-Air Freight.

The Bureau has further alleged that during the period from 1971 to 1977, Century Air Freight, Inc. ("Century"), an air freight forwarder based in New York, made numerous requests for positions on American's flight. Each Century request during that period for an indefinite allocation of "A" container space was denied on the ground that all available space was committed. In May 1977, Century sued American in Federal District Court in New York, claiming that American had engaged in an unlawful restraint of trade in violation of the Sherman Act by agreeing with Profit By Air to deny Century space, and that American's actions also violated the Federal Aviation Act. In September 1977, American allocated Century the equivalent of one "A" container position on Flight No. 841. However, Century contends that its freight has often been broken out of its container and fitted into whatever space is available on the aircraft, subjecting Century to greater recovery time and higher frequency of loss than if its freight were containerized. In August 1978, Century sought unsuccessfullly at least one of the three Shulman positions then available.

This matter came to the Bureau's attention when American and Century stipulated that certain issues should be referred to the Board under the doctrine of primary jurisdiction. At the parties' request, the District Court stayed

further judicial proceedings pending action by the Board on Century's complaint. Following an investigation, the Bureau filed its complaint in this proceeding.

The complaint alleges specifically that since American began its overnight all-cargo service from New York to San Juan in 1971, American has allocated to a few forwarders all the desirable positions on these flights—namely the main deck "A" container positions—for an indefinite period. When American allocates such a position to a forwarder, that forwarder has a right to the position as against any other forwarder, until such time as American or the forwarder alters the arrangement. Such alterations are rare, however, From late 1971 to mid-1978, the same three forwarders held all twelve standard main deck "A" container positions on the flight. The Bureau contends that this indefinite preference for some forwarders for an extensive period of time, and indefinite exclusion of others seeking the American service, violates section 404(b).

American has denied any violation of section 404(b) and has raised affirmative defenses to the Bureau's complaint. American does not admit the legal or factul contentions of the Bureau. However, for the purposes of settling this proceeding, and subject to the conditions and limitations of the memorandum of agreement, American consents to the entry of this Consent Order.

Therefore, on the basis of the Bureau's factual and legal contentions, and American's agreement not to contest them in this proceeding, we find that American violated section 404(b) in its indefinite allocations of space on Flight No. 841. *Transcontinental Bus System, Inc.* v. *C.A.B.*, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968); *Emery Air Freight and Air Midwest, Inc.*, Order 73-4-8 (April 2, 1973). We also find that the allocation system which American has agreed to implement in order to settle this proceeding will provide a fair reso-

lution of this particular case. It addresses whatever effects American's practice might have had on the route, gurantees a fair opportunity to all shippers to compete for access to American's service, and is also tailored to meet American's legitimate business needs. The system limits all reservations to one year and requires American to consider applications each year from all forwarders and shippers using basically the same criteria, regardless of whether they have previously held reservations on the flight. All shippers who tender shipments for the relatively less sought after northbound segment will be guaranteed at least one reserved southbound position, and all remaining positions will be allocated according to criteria which take into account this and other factors affecting American's likely yield.

Although the system now agreed to is to operate until December 31, 1984, there is no requirement that American continue to operate overnight service; the system is applicable only if American chooses to continue to offer such a service, and if demand for reserved positions on the service exceeds supply. If, however, unexpected contingencies arise, or American believes that it or its customers have become unduly burdened by this allocation method, our order expressly provides that American can apply to the Board for appropriate modifications. Moreover, we will look favorably upon such an application if American can demonstrate that this method of allocating reserved space is unduly hindering the profitability of its flight, since our intention in issuing this order is not to intrude upon the exercise of American's business judgment within the limits of the law.

ACCORDINGLY,

1. We approve the settlement agreed to by American Airlines, Inc. and the Bureau of Consumer Protection.

2. American Airlines, Inc. is ordered to cease and desist from engaging in any unjust discrimination against forwarders, within the meaning of section 404(b) of the Act, in its allocation of reserved "A" container positions on its overnight all-cargo service between New York and San Juan.

3. American shall deliver to the Director, Bureau of Consumer Protection, a check or draft made payable to the Treasurer of the United States in the amount of $50,000 within 7 days of the date this order becomes a final order of the Board.

4. American shall follow the procedures set out in Appendix B to this order until December 31, 1984 in allocating reserved "A" container positions on its overnight all-cargo service from New York to San Juan. American may apply to the Board at any time for modification of this procedure, and such modification shall be granted upon a showing (i) that the procedure is unduly hindering the profitability of American's service and is unnecessary to prevent unjust discrimination or the effects of any past unjust discrimination; or (ii) that modification is warranted by charges in applicable law or regulations.

5. This order is issued by authority delegated in 14 C.F.R. 385.11. Persons entitled to petition the Board for review of this order under Board regulations, 14 C.F.R. 385.50, shall file their petitions within 10 days of the date of service of this order. This order shall be effective as final action of the Civil Aeronautics Board after the 10 day period, unless a timely petition for review is filed or the Board takes review on its own within that period.

6. This proceeding is terminated.

By Henry M. Switkay
Administrative Law Judge

PHYLLIS T. KAYLOR
Secretary

(SEAL)

APPENDIX 6

Century's Petition to CAB, May 1, 1981, for Review of Law Judge's Order, Annexing "Comments" in Opposition to Motion to Approve Settlement.

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Docket 37278

AMERICAN AIRLINES, INC.
NEW YORK-SAN JUAN CARGO SERVICE

Enforcement Proceeding

CENTURY AIR FREIGHT, INC., a party herein, hereby petitions the Civil Aeronautics Board, pursuant to 14 C.F.R. 385.50, for review of the Consent Order herein of Hon. John M. Vittone, Administrative Law Judge.

1. The ground for this petition is that the Consent Order embodies a premise that is, in a fundamental way, contrary to law and involves a substantial and important question of policy, in that

A. Contrary to and violative of the common carrier status fastened on all-cargo air carriers by section 1002(k) of the Act and the concomitant obligation of American Airlines, Inc. to carry, at uniform rates for the same classes and quantities, such goods offered for shipment by the shipping public as are within the categories of goods it ordinarily carries, the Consent Order with its Appendix B subjective criteria requiring only American's consideration of applications, permits, allows to continue, and validates an illegal,

unbridled exercise of customer selection and rejection on the part of American, save for American's obligation to furnish one southbound container allocation to each steady northbound shipper of one or more containers, all in violation of § 404(b) of the Act, and of § 411 of the Act.

B. In violation of sections 1 and 2 of the Sherman Antitrust Act, the "essential facility" doctrine enunciated in *Hecht* v. *Pro-Football, Inc.*, 570 F. 2d 982 (D.C. Cir. 1977), certiorari denied, 436 U.S. 956 (1978) and, consequently, § 411 of the Act, the foregoing grant by the Consent Order to American of a practical right of customer selection, gives American the absolute right, save for the one container southbound allocation for qualifying northbound shippers, to exclude any member of the shipping public from its essential facility.

C. The Consent Order would validate the prior exclusionary and discriminatory practices of customer selection and rejection upon which this Civil Aeronautics Board complaint was issued, in that it requires no change whatsoever in the anticompetitive practices of American which had prompted the issuance of the complaint herein; and the southbound allocation for northbound shippers makes no change in the actual practices prevailing at the beginning of this proceeding.

2. For purposes of augmentation of the allegations of this petition, the annexed "Comments of Century Air Freight, Inc. in Opposition to Motion to Approve Settlement" are incorporated into this petition and made a part hereof. The "comments" also show that the matter adduced in this petition is not new, but was brought to the attention of Board personnel at the staff action level.

WHEREFORE we respectfully request that the Civil Aeronautics Board grant review of the Consent Order herein.

Dated: New York, New York
May 1st, 1981

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APPENDIX 6 (ANNEX)

"Comments" of Century in Opposition to Motion

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Docket 37278

AMERICAN AIRLINES, INC.
NEW YORK-SAN JUAN CARGO SERVICE

Enforcement Proceeding

COMMENTS OF CENTURY AIR FREIGHT, INC. IN OPPOSITION TO MOTION TO APPROVE SETTLEMENT

Century Air Freight, Inc. is opposed to this motion to approve the proposed settlement between the Bureau of Consumer Protection (BCP) and American Airlines, Inc. (American) because we think the proposal is fundamentally and irretrievably illegal; an out and out program of a right of unbridled customer selection by American as a direct air carrier in head-on conflict with both the strong *common carrier* identity fastened upon the all-cargo air carriers by Congress in its 1977 enactment for the regime of deregulation, 49 U.S.C. § 1482 (k); § 1002 (k) of the Act, and the antitrust interdiction, under §§ 1 and 2 of the Sherman Act, found in the "essential facility" doctrine perhaps best enunciated in *Hecht* v. *Pro-Football, Inc.*, (D.C. Cir. 1977) 570 F. 2d 982, certiorari denied, 436 U.S. 956 (1978) which we feel, especially in the case of a statutory common carrier, is unimmunizable under § 414 of the Act. In this latter connection of a relevant market of confirmed air freight traveling from New York City to San Juan on regularly scheduled cargo service, it is patent that American's Flight 841 service constitutes a facility es-

sential to successful operations in this market. Since, as a practical matter, air freight forwarders simply cannot duplicate these services, the available space must be allocated on fair terms reflecting proportionate shares of the recurring and steady demand therefor if a settlement here were to be compliant with the antitrust requirements of *Hecht*. It seems to us that a noncompliant arrangement such as the instant settlement proposes, would necessarily be violative of section 411 of the Federal Aviation Act.

Since our quarrel is fundamentally with the proposed settlement itself, seeking CAB sanction for future conduct which, it seems to us, is necessarily violative of Congressional mandate, we do not seek to raise any factual issues here. Nevertheless, to avoid the confusion of seeming agreement in important background matters where American and Century are at issue we point out the following:

a) Century denies the statement attributed to American on page 2 of the Motion,

> "• • • that it [American] offered Confirmed Air Freight space on its overnight freighter on a first-come, first-served basis, that Century was offered space in 1971 on such a basis and rejected it, and that Century's subsequent requests for recurring reservations of space could not be satisfied by American because the flight had been filled • • •"

and states that *never* did American offer space to Century on a first-come, first-serve basis—and in August 1978 when Shulman's demise opened three "A" container positions on Flight 841, the priority of Century's long-standing requests availed it nothing against three newcomers.

b) It is distortion by omission to say as page 2 of the Consent Order says, that the matter came to the CAB's attention by stipulation. The record fact is

that American as district court defendant moved dismissal of Century's court complaint on the ground that the CAB had exclusive jurisdiction of the matter, and that Century, instead of opposing, stipulated for the CAB to give the matter whatever attention it elected, if any, and the CAB advised the Court it had decided to accept primary jurisdiction referral and would investigate the matter, whereupon the Court stayed the action pending completion of CAB proceedings. But the plain fact remains that, but for American's primary jurisdiction motion, this matter would have proceeded in the district court without interruption and without referral to this agency.

c) Completely accurate is the Consent Order statement on page 2:

> "• • • In August 1978, Century sought unsuccessfully at least one of the three Shulman positions then available."

And it is the setting of that unsuccess, in August 1978 when the lawsuit had been commenced more than a year before with Century gaining a one-position allocation, *before* referral to the Board, aboard the much coveted Flight 841 and with the matter then eight months under investigation by the Board, that gave American the confident belief that it could, with legal safety, cut Century, now the second largest volume air freight forwarder in the New York-San Juan trade, and stop any further access to Flight 841 on its part.

The source of American's confidence was the coming suspension, to be effective November 9, 1978, of the decades old provision, under section 404 (a) of the Act, spelling out the essence of common carrierhood—the duty to carry on reasonable request. The Board's draft Memorandum of July 24, 1978 gave every indication that henceforth the

operator of aircraft would be free of this duty and therefore at liberty to pick and choose his customers—and exclude the unwanted.

Thus the Memorandum of July 24, 1978, pp. 14, 15:

> "The proposed exemption from section 404(a) of the Act would * * * relieve the carriers from the * * * requirement to carry 'upon reasonable request.'" (p. 14)

and at page 15 of the draft:

> "Our proposed exemption from the duty to carry on reasonable request is not based on our own inability to enforce the duty, but rather our tentative view that his 'duty', too, should be a matter of normal commercial decision-making rather than a thing determined under the law. The marketplace appears to function quite well in determining such matters as what kinds of foods are stocked by supermarkets * * * and we see no reason why a free-entry system will not work as well with domestic air freight.
>
> "The exemption from most of subsection 404(a) of the Act that we are here proposing does not, of course, extend to subsection 404(b), and we propose to continue our present authority to correct rates that are discriminatory, preferential, or prejudicial. * * *"

The draft Memorandum of July 24, 1978 preceded and undoubtedly formed the "legal" basis for American's anticipations of an administrative permissiveness towards its August 1978 denial of any space in the vacated Shulman block to Century. But a draft is only a draft.

The Board scheduled public hearings and argument on the proposed regulations for October 19, 1978, and Century's counsel addressed the Board (page 111 of the stenographic transcript)

> "I am here * * * to express concern, in the name of deregulation [over] the removal of the competitive

protection of common carrier status from 418, and I will say, in quotes, '[de] regulated' all-cargo carriers.

• • • •

"• • • At the same time, as has been pointed out, Congress has been very specific from the preamble on down through the modification of 102 in saying, no unjust discrimination, no undue preferences, no predatory practices, no discriminatory pricing, and I think that this Board owes it to the industry and to the public to go slow on a complete turnabout of what is a fundamental concept in keeping the competitive channels free and open."

Five days after the hearings of October 19, 1978, the 1978 deregulation enactments were signed into law.

The new Rules, Regulation ER-1080, issued on November 9th, 1978, while exempting cargo carriers from the duty to carry on reasonable request, not only explained a rather limited scope to that exemption, but gratifying and strongly preserved the common carrier status and obligations of scheduled all-freight air carriers. Thus at pages 11 and 12 of the new Regulations:

"Duty to Carry

"The Board is also exempting carriers in domestic cargo transportation from the duty under Section 404(a) of the Act to carry on reasonable request, for the reasons stated in EDR-359 (pp. 14-15). Many respondents opposed this exemption, claiming that the carriers would take advantage of their freedom from a legal duty to carry by refusing to transport outsized, perishable, and other kinds of cargo, such as live animals.

"This exemption, however, does not relieve the carriers of their service obligations as common carriers,

and does not appiy to a carrier's duty to refrain from providing preferential treatment to particular companies or persons. Carriers holding certificates under section 401 or *418* of the Act *remain, by definition, common carriers.* The statutory duty to provide service upon reasonable request is broader than the service obligations of a common carrier at common law. At common law, a carrier is permitted to hold itself out as a carrier of only a particular kind of freight, and it is not obligated to carry other types of cargo. This exemption, therefore, *only* ends the Board's role in regulating the *extent of the carrier's service offering,* • • •" (emphasis supplied)

It was *Congress'* vehement insistence upon fastening the obligation of a common carrier upon operators of commercial scheduled cargo carrying aircraft into the scheme of deregulation that prompted the Board, in its actual Regulation, to indicate how limited was the sweep of the suspension of 404 (a)'s "duty to carry on reasonable request". The text of subsection k, added to section 1002 of the Act in 1977 is annexed to these comments, and it is noteworthy that the phrase "common carrier" is used no less than 12 times in the subsection.

Section 102 of the Act, as amended and added to by Congress in 1977 and 1978, shows a clear and strong Congressional purpose in its deregulation scheme not to cast the industry adrift in a dog eat dog domain without brake on the ability of the strong to despoil the weak—ironically the most anticompetitive measure imaginable—but rather to give the Board a powerful and central role in keeping the channels of true competition free and open. Again and again, section 102, both for general and explicitly for all-cargo service, directs the Board to act against discrimination, preferences, and unfair or deceptive practices.

Appendix 6

The 1978 addition of subsection (7) to section 102 (a) of the Act could not be more explicit in describing a Board duty to preserve to the greatest extent possible freedom from restraint of access of the shipping public to carriage:

> "102 (a)(7). The preventation of unfair, deceptive, predatory, or anti-competitive practices in air transportation, and the avoidance of—
>
> (A) unreasonable industry concentration, excessive market domination, and monopoly power; and
>
> (B) other conditions;
>
> that would tend to allow one or more air carriers unreasonably to increase prices, reduce services, or exclude competition in air transportation. * * *".

and yet the Board is being asked to approve a settlement that, save for an inconsequential duty to match one Flight 841 "A" container allocation to those undertaking the steady use of one or more container positions on the northbound turnaround flight, reserves to American a complete and unlimited control in the selection of its customers—with a concomitant right of exclusion of those shippers whom American chooses, for any reason whatsoever, not to accommodate. The proposed settlement requires nothing of American that it has not been doing since September 1977 when it yielded the equivalent of one container position aboard Flight 841 to Century *before* the matter was referred to the Board. So much the Motion for Approval acknowledges:

> "* * * Beyond the initial guarantee that anyone providing northbound shipments will be given one reserved southbound allocation, the allocation system permits American to select customers based upon factors directly related to profitability, including solicitation of northbound shipments and density and type of goods to be tendered."

But, should Century desire additional container space

aboard Flight 841, paragraph 10 of the Memorandum of Agreement between American and BCP provides, whatever the euphemisms of expression, for a recognition of the possibility that Century may trade off its district court suit for additional space:

> "10. It is understood that American may, consistent with the requirements of the allocation system contained in Appendix B to the Consent Order, allocate reserved main deck 'A' container positions on Flight No. 841 to Century as part of any resolution of the private suit now pending between American and Century."

Many cynical people would read the foregoing in a practical way to mean that for Century—and for Century alone—more space aboard Flight 841 beyond one "A" container can be gotten *only* by trading off the suit.

We think that the notion underlying the proposed settlement is that maintaining the economic health—profitability—of an important actor in the industry, is the most important objective of deregulation. That may be so, but it is also a more paramount truism that a beneficial objective does not save that which is accomplished by an illegal means.

Whatever the areas of Board discretion, and in this agency they have been broad indeed, the outer limits are measured by the legislative grant. When Congress mentioned "common carrier" no less than 12 times in section 1002 (k), its new regulation for all-cargo carriers in the era of deregulation, it was not voicing some merely precatory desire on the part of a lay legislative body that could readily yield to the better advised expertise of an agency set up to handle the sort of problems that arise in this age of specialization. Rather it seems plain that Congress, by enacting section 1002 (k) and section 102 (a) (7) was

mandating to the Board the duty to preserve common carrier principles alive among the all-cargo carriers, i.e., to accommodate all shippers tendering the kinds of cargo American would carry, and where such demand exceeded the space, accommodating as equitably as possible, proportionately within the practicalities of a rule of reason, the allocations of available space. To these principles, the proposed settlement requires no change at all in American's existing practice other than to give wholly discretionary "consideration" to applications. The northbound container utilization requires giving no southbound shipper any more space allocations southbound than he already has. As before Profit By Air, the largest forwarder in the trade, has 8 main deck container positions, two-thirds of the allocable space, while Century, the second largest forwarder, has 1 container position, but it can get more if it gives American *quid pro quo* on the district court lawsuit. Of the three who succeeded Shulman, Air Express International, Burlington Northern and Bor-Air, Bor-Air has dropped out of the picture since its custom went over to Century. Still Bor-Air's position has not gone over to Century, and presumably the Bor-Air position is hanging in American's shop window waiting for a trade.

Thus it is apparent to us that the untrammeled right of customer selection reserved to American in the proposed settlement cannot be reconciled with permissible allocation procedures consistent with the statutory status of American, as operator of Flight 841, as a common carrier.

To approve it would, we feel, be violative of the Aviation Act and the Sherman Act. And the one thing an administrative agency cannot do is violate its own Act, *Federal Maritime Board* v. *Isbrandtsen*, 356 U.S. 481 (1958). And see *Seatrain Lines, Inc.* v. *Federal Maritime Commission*, 460 F. 2d 932, 935 (D.C. Cir. 1972).

We urge that the proposed agreement be disapproved, and that the parties thereafter be given an opportunity to work out a valid settlement.

Respectfully submitted,

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Annexed to the Comments was a marked copy of section 1002 (k) of the Act; 49 U.S.C. § 1482 (k).

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No. 82-122

In the Supreme Court of the United States

OCTOBER TERM, 1982

CENTURY AIR FREIGHT, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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MEMORANDUM FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

Petitioner contends that the Civil Aeronautics Board erred in approving the terms of a settlement of an enforcement proceeding concerning the allocation of reserved container space on American Airlines' now-discontinued overnight cargo flight from New York City to San Juan, Puerto Rico.

1.a. From 1971 until August 1, 1981, American Airlines operated an all-cargo flight each night from New York to San Juan, Puerto Rico. The flight was attractive to air freight forwarders, such as peti-

tioner, because it provided them with next-morning delivery in San Juan. Accordingly, there was insufficient space on the flight to satisfy the demand. By the end of 1971, American had allocated all 12 of the available container positions. As a result, petitioner was unsuccessful at that time and in succeeding years in obtaining space on the flight, although it subsequently did obtain one container position in 1977 (Pet. App. 54-55). In 1977, petitioner filed suit against American in the United States District Court for the Southern District of New York seeking damages and injunctive relief for alleged violations of the antitrust laws and the Federal Aviation Act in connection with the allocation of container space. *Century Air Freight* v. *American Airlines*, No. 77 Civ. 2195 (S.D.N.Y.). The parties agreed that the matter would be referred to the Civil Aeronautics Board in accordance with the doctrine of primary jurisdiction, and the district court stayed further proceedings pending such referral (Pet. App. 55-56).

b. The Board has discretionary authority under Sections 411 and 1002(a) of the Federal Aviation Act of 1958, 49 U.S.C. 1381 and 1482(a), to institute a formal investigation into alleged violations of the Act when it finds such an investigation warranted by the public interest. Violations of the antitrust laws may be treated as unfair methods of competition subject to the Board's jurisdiction under Section 411. See *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 303-307 (1963).

In this case, after an informal investigation, the Board's Bureau of Compliance and Consumer Protection concluded that American's allocation practices appeared to constitute an unjust discrimination proscribed by Section 404(b) of the Act, 49 U.S.C.

1374(b), and an unfair method of competition proscribed by Section 411, 49 U.S.C. 1381. The Bureau determined, however, that a proceeding should be instituted only on the unjust discrimination issue, because resolution of the unfair competition issue was not deemed necessary to protect the public interest. Rather than dismiss petitioner's antitrust claims outright, however, the Bureau offered petitioner a choice: (1) it could file a formal complaint with the Board and prosecute the antitrust issues without active assistance from the Bureau, or (2) upon completion of the Board proceedings on the unjust discrimination issue, petitioner could renew its antitrust action in the district court. Petitioner elected the latter alternative (Pet. App. 42-43).

c. Before the hearing began on the unjust discrimination issue, the Bureau and American reached a settlement agreement, under which American was required to pay $50,000 in civil penalties, alter its allocation practices for the flight, and comply with the prohibtion in Section 404(b) of the Act against unjust discrimination. The settlement required American to limit the duration of all reservations on its overnight cargo flight to San Juan to one year and to consider applications each year from all freight forwarders and shippers under essentially the same criteria. All shippers who tendered shipments for the northbound flight from San Juan to New York were to be guaranteed at least one reserved southbound position, and the remaining positions were to be allocated according to such factors as the applicant's financial stability and credit record, the type of shipments, and other matters that might bear on revenue and costs (Pet. App. 40-41, 43, 50-51, 57). The Administrative Law Judge (ALJ) approved the settlement, concluding that the agreed-upon allocation

system would "provide a fair resolution of the particular case" because it "addresses whatever effects American's practice might have had on the route, guarantees a fair opportunity to all shippers to compete for access to American's service, and is also tailored to meet American's legitimate business needs" (Pet. App. 57).

The Board affirmed the ALJ's consent order. The Board observed that because there was excess demand for reserved container positions, "American obviously must use some method of allocating the available positions among the shippers requesting them" (Pet. App. 44). The method of allocation agreed to by American and the Bureau was, in the Board's view, fair (*ibid.*). The Board rejected petitioner's contention that the settlement gave American unlimited discretion in allocating space, noting that the allocation system did not authorize American to select customers unlawfully or improperly and placed substantial limitations on American's discretion in order to ensure against unjust discrimination. The Board also stated that petitioner had not explained how the allocation system would injure it or "suggested any alternative means of allocating container positions which would be both fair and practicable" (Pet. App. 45). The court of appeals affirmed the Board's decision by memorandum order (Pet. App. 38).

2. This case, especially in its current posture, presents no issue warranting review by this Court.

a. The allocation system set forth in the consent order applied only if American chose to continue overnight cargo service from New York to San Juan (Pet. App. 49 & n.2; 57-58). As petitioner notes (Pet. 21), American discontinued its overnight cargo flight from New York to San Juan on August 1, 1981, and petitioner has not pointed to any evidence indi-

cating that American intends to renew such service prior to December 31, 1984, the date on which the allocation requirement terminates (Pet. App. 49, 57). This case therefore would appear to be moot. See, *e.g.*, *Murphy* v. *Hunt*, No. 80-2165 (Mar. 2, 1982); *Weinstein* v. *Bradford*, 423 U.S. 147 (1975); *SEC* v. *Medical Committee for Human Rights*, 404 U.S. 403 (1972).

b. Quite aside from its apparent mootness, this case is not an appropriate vehicle in which to resolve the statutory issues raised by petitioner concerning a carrier's obligation to treat shippers equally, because the Board, in the order under review, merely approved a settlement reached before any hearing was held in the Board proceeding. The statutory issues accordingly were not fully litigated below. Moreover, "where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 112 (1946), quoting *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941). Accord *Butz* v. *Glover Livestock Commission Co.*, 411 U.S. 182 (1973); *Commonwealth of Virginia* v. *CAB*, 498 F.2d 129, 134 (4th Cir.), cert. denied, 419 U.S. 1048 (1974). Whether the Board abused its discretion in approving the particular settlement at issue in order to achieve the purposes of the statutory prohibition against unjust discrimination does not warrant review by this Court.

c. In addition, although airlines do have a statutory duty to treat shippers equally, petitioner is mistaken in asserting (Pet. 23-31) that this duty derives from Section 1002(k) of the Act, 49 U.S.C. (Supp. IV) 1482(k). American's duty not to engage in

unjust discrimination derives instead from Section 404(b), and the settlement expressly requires American to comply with that Section (Pet. App. 58). In contrast, Section 1002(k) does no more than define, for purposes unrelated to the issues here, the term "interstate air transportation of property." Prior to 1977, there had been no difference between the Board's jurisdiction over domestic passenger fares and its jurisdiction over domestic cargo rates. As part of the deregulation of airlines, the Board's jurisdiction over cargo rates was for the most part eliminated. The definition of "interstate air transportation of property" in Section 1002(k) therefore was added in 1977 for the purpose of defining the kind of rates that thereafter would be free of the Board's traditional rate jurisdiction. See Pub. L. No. 95-163, Section 18(e)(1), 91 Stat. 1287; H.R. Rep. No. 95-773, 95th Cong., 1st Sess. 14 (1977). Petitioner thus clearly errs in contending that Section 1002(k) was intended to impose new duties on carriers.[1]

d. Petitioner's claim (Pet. 31-35) that the Board was required to investigate its antitrust allegations misconstrues the nature of the Board's duty to investigate complaints that a carrier has violated the Act. The courts have held that where, as here, the Board acts pursuant to its duty under Sections 411 and 1002(a), 49 U.S.C. 1381 and 1482(a), to investigate allegations of unlawful conduct, the Board has the discretion to dismiss a complaint on a finding

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[1] Section 404(a), 49 U.S.C. (Supp. IV) 1374(a), imposes on airlines the traditional common carrier duty of providing transportation "upon reasonable request therefor * * *." The Board, however, has exempted carriers from that duty with respect to domestic cargo transportation. 14 C.F.R. 291.30-291.35. See *National Small Shipments Traffic Conference, Inc.* v. *CAB*, 618 F.2d 819, 831-832 (D.C. Cir. 1980).

that a formal investigation would not be in the public interest. *Flying Tiger Line, Inc.* v. *CAB*, 350 F.2d 462, 465 (D.C. Cir. 1965) (Burger, J.), cert. denied, 385 U.S. 945 (1966); *Flight Engineers International Association* v. *CAB*, 332 F.2d 312, 314-315 (D.C. Cir. 1964); *Trailways of New England, Inc.* v. *CAB*, 412 F.2d 926, 930-932 (1st Cir. 1969). The Board's powers under these sections are to be used to protect public, not private interests. *American Airlines, Inc.* v. *North American Airlines, Inc.*, 351 U.S. 79, 83 (1956). In this case, of course, petitioner never even filed a formal complaint with the Board and chose instead to reserve its antitrust claim for trial in the district court. In these circumstances, the Board acted well within its discretion in declining to resolve those issues. As the court of appeals observed (Pet. App. 38), the Board's order did not intimate any view on whether American's conduct between 1971 and 1981 violated the antitrust laws, and the settlement and the Board's approval of it have no bearing on petitioner's antitrust suit, which petitioner is free to pursue (*id.* at 45, 46-47).

It therefore is respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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Petitioner,

against

CIVIL AERONAUTICS BOARD and AMERICAN AIRLINES, INC.,
Respondents.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

The premise of the petition of Century Air Freight, Inc., ("Century") is that if Congress, in the enactment of §1002(k) of the Aviation Act, 49 U.S.C. §1482(k), intended to mandate common carriage as the basis for air transportation of goods in commerce, the inference is compelling that, as a pervasively fundamental measure for the protection of the shipping public, the interpretation, application and enforcement of that statute is, in its manifest actualities and as a conclusion of law, a matter of intensely important public interest.

1. In the progression of administrative adjudication and judicial review, respondent Civil Aeronautics

Board ("CAB"), by its Orders (Pet., Appendices 2 and 3) approved and gave legal sanction to a virtually unbridled right on the part of respondent American Airlines, Inc. ("American") to select or reject shippers of containerized cargo for yearly allocation of space aboard its prime time flight. On review, the Court below explicitly upheld the validity of the CAB's "allowing American Airlines to refuse reasonable requests for service" (Pet., Appendix 1), notwithstanding that all requests were for the same service offering of American, viz., the carriage of containerized general commodity cargo (Pet., p. 49).

Now, in his Memorandum for the CAB, the Solicitor General makes frontal attack on §1002(k) of the Act (Text in Pet., pp. 2-5). Thus at page 6 of his Memorandum:

> "* * * The definition of 'interstate air transportation of property' in Section 1002(k) therefore was added in 1977 for the purpose of defining the kind of rates that would thereafter be free of the Board's traditional rate jurisdiction. See Pub. L. No. 95-163, Section 18(e)(1), 91 Stat. 1287; H.R. Repb. No. 95-773, 95th Cong., 1st Sess. 14 (1977). Petitioner thus clearly errs in contending that Section 1002(k) was intended to impose new duties on carriers.[1]
>
> * * * * * *

"1 Section 404 (a), 49 U.S.C. (Supp. IV) 1374 (a), imposes on airlines the traditional common carrier duty of providing transportation upon reasonable request therefor * * *.' The Board, however, has exempted carriers from that duty with respect to domestic cargo transportation. 14 C.F.R. 291.30-291.35. See *National*

Small Shipments Traffic Conference, Inc. v. CAB, 618 F.2d 819, 831-832 (D.C. Cir. 1980)."

Whether the foregoing is or is not actually the case, both the public and the Congress which enacted it, ought to have the benefit of an authoritative decision by this Court as to whether §1002(k) of the Act which is wholly devoted to defining "air transportation" in terms of common carriage, starts by providing that

> " * * * the term 'interstate air transportation of property' means —
>
> "(A) the carriage by aircraft of property as a common carrier for compensation or hire in commerce * * * ",

repeat the phrase "common carrier" eleven times thereafter and never once utters the word "rates" nor makes even remote reference to that subject, was not really intended to be, as it so directly reads, a fresh imposition of common carrier duties and status upon the operators of scheduled commercial aircraft, rather than, unintelligible from the statutory text, a statute "for the purpose of defining the kind of rates that would thereafter be free of the Board's traditional rate jurisdiction."

Nothing in the entirety of Public Law, No. 95-163 of November 9, 1977; 91 Stat. 1278-1289, nor of H.R. Report No. 95-773, 95th Congress, 1st Session 1977, U.S. Code Congressional and Administrative News Service, 3396-3400, supports the position of the Solicitor General's Memorandum; the actual rate amendments are clustered in §1002(d) and (g); the common carrier enactment of §1002(k), wholly new, is

palpably an undiluted mandate for common carrier status and duties imposed on air carriers of freight.

And the CAB's present position, expressed in the footnote at page 6 of its Memorandum to the effect that the domestic cargo exemption from §404(a)'s duty to carry on reasonable request has worked a *pro tanto* repeal of common carrier status and duties, is belied by the CAB's own authoritative statement in its Regulations ER-1080 of November 9, 1978 issued simultaneously with the exemption:

"Duty to Carry

"The Board is also exempting carriers in domestic cargo transportation from the duty under section 404 (a) of the Act to carry on reasonable request, * * *

"This exemption, however, does not relieve the carriers of their service obligations as common carriers, * * *. Carriers holding certificates under section 401 or 418 of the Act remain, *by definition*, common carriers. The statutory duty to provide service upon reasonable request is broader than the service obligations of a common carrier at common law. At common law, a carrier is permitted to hold itself out as a carrier of only a particular kind of freight, and is not obligated to carry other types of cargo. This exemption, therefore, only ends the Board's role in regulating the extent of the carriers' service offerings, * * *." (emphasis supplied, Pet. pp. 5, 6)

The holding of the Court below in the 1980 case of *National Small Shipments Traffic Conference v. CAB*, 618 F. 2d 819, is consistent with the CAB's narrow construction—in deference to and recognition of the common carrier status and duties imposed by §1002(k)—confining exemption from the duty to carry on reasonable request to a carrier's right to limit its

range of service offerings, and to refuse carriage for goods outside of those categories of goods which it holds itself out as carrying, e.g., bulk cargo as against containerized freight, perishables, explosives, live animals, and the like. The petitioners in that case were representatives of specialty shippers and the Court's holding was that the carriers could, under the exemption from the duty to carry on reasonable request, refuse to carry petitioners' categories of goods.

This case therefore is the first instance to reach this Court where the CAB and the Court of Appeals have crossed the line of mere limitation of service offerings to validate the right of carriers to refuse to honor the reasonable requests of some shippers tendering the same goods the carrier regularly carries for others, to select or reject such customers, and to negotiate with each customer the terms upon which the carrier will transport his goods. In short, notwithstanding §1002(k) of the Aviation Act, the CAB has here exempted domestic air carriers from the need to comply with the mandates for common carriers required by that statute.

2. If we regard the issue of the status of §1002(k) of the Act as mandating common carriage status and duties upon air carriers of goods as an important question of federal law, decided by the CAB and the Court of Appeals, which ought to be but has not been settled by this Court, then it ought not to be allowed to be sidetracked by extraneous arguments not going to that issue.

Such an argument is presented at pages 6 and 7 of the Memorandum for the CAB to the effect that the virtually boundless power of the CAB, under §§411

and 1002(a) of the Act; 49 U.S.C. secs. 1381 and 1482(a), to dismiss a complainant's administrative complaint on a finding that a formal investigation would not be in the public interest — citing *Flying Tiger Line, Inc. v. CAB*, 350 F2d 462 (LD.C. Cir. 1965), *cert. denied*, 385 U.S. 945 (1966), *Flight Engineers International Association v. CAB*, 332 F.2d 312 (D.C. Cir. 1964), *Trailways of New England, Inc. v. CAB*, 412 F.2d 926 (1st Cir. 1969), and *American Airlines, Inc. v. North American Airlines, Inc.*, 351 U.S. 79 (1956) — somehow survives to endow the CAB with an immunity, *after* it has instituted a formal proceeding, from having to comply with the rules of law applicable to the particular case.

Section 411 of the Act, 49 U.S.C. sdec. 1381, makes it abundantly clear how absolute is that power, properly timed in a preliminary stage, to block beyond judicial review any further action in an administrative matter:

> "§411 *Methods of competition*
>
> The Board may, upon its own initiative or upon complaint by any air carrier * * * *if it considers that such action by it would be in the interest of the public*, investigate and determine whether any air carrier *** has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, *after notice and hearing*, that such air carrier * * * is engaged in such unfair or deceptive practices * * *, it shall order such air carrier * * * to cease and desist from such practices or methods of competition." (emphasis supplied)

But here the agency dismissed no complaints; indeed it issued its own complaint and instituted a formal Enforcement Proceeding against American:

AMERICAN AIRLINES, Inc.
NEW YORK — SAN JUAN CARGO SERVICE

Enforcement Proceeding
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and with the institution of that proceeding the CAB's actions and orders came under the rule of legal accountability prescribed by 5 U.S.C. §706 of the Administrative Procedures Act (Petition, Appendix 4, p. 69), including, of course, the question of the validity of its orders herein under §1002(k) of the Act.

Finally, given the public importance of the question of statutory common carriage here presented to this Court for authoritative settlement, it is simply inconceivable that American has the unilateral power, simply by changing flight schedules on the same actively maintained route, to foreclose review and settlement that would otherwise be had but for the "mootness" claimed for the issue. The Congress which enacted §1002(k) of the Act, the shipping public — including Century as a member of that public — which the statute was obviously intended to protect, and the industry itself ought to have the benefit of this Court's adjudication of the issue.

3. We point out the oversight in the caption of the Solicitor General's Memorandum in omitting

American Airlines, Inc. as a party respondent in this certiorari proceeding.

WHEREFORE PETITIONER EARNESTLY REITERATES ITS PRAYER FOR THE GRANT OF A WRIT OF CERTIORARI HEREIN.

Respectfully submitted,

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